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Deconstructing Gender

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DECONSTRUCTING GENDER¹

Joan C. Williams*

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1. I am not using "deconstruction" in the technical sense used by critical legal scholars influenced by Jacques Derrida, *see, e.g.,* Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985), but in the emerging popular sense of deconstructing a social phenomenon into its component parts.

INTRODUCTION

I start out, as have many others, from the deep split among American feminists between "sameness" and "difference."² The driving force behind the mid-twentieth-century resurgence of American feminism was an insistence on the fundamental similarity of men and women and, hence, their essential equality. Betty Friedan comes to mind as an enormously influential housewife whose focus on men and women as individuals made her intensely hostile to gender stereotyping.³

Mid-century feminism, now often referred to somewhat derisively as assimilationism, focused on providing opportunities to women in realms traditionally preserved for men.⁴ In the 1980s two phenomena have shifted feminists' attention from assimilationists' focus on how individual women are *like* men to a focus on gender *differences*, on how women as a group differ from men as a group. The first is the feminization of poverty, which dramatizes the chronic and increasing economic vulnerability of women.⁵ Feminists now realize that the as-

2. A wide range of scholars has identified the task of resolving this split as the major challenge for modern feminism. See, e.g., Alcoff, *Cultural Feminism Versus Post-Structuralism*, 13 SIGNS: J. WOMEN CULTURE & SOC'Y. 405 (1988); Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988); Boris, *Looking at Women's Historians Looking at "Difference,"* 3 WIS. WOMEN'S L.J. 213 (1987); Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); Scott, *Deconstructing Equality Versus Difference: Or, the Uses of Post-Structuralist Theory for Feminism*, 14 FEM. STUD. 33 (1988); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Minow, *Rights of One's Own* (Book Review), 98 HARV. L. REV. 1084 (1985). Christine Littleton offers an especially interesting and insightful analysis of how various groups of legal feminists are distributed across "sameness" and "difference." See Littleton, *supra*, at 1292-301. Robin West implicitly discounts "sameness" feminists by omitting them from her description of feminist thought. See West, *supra*, at 13-15. This position is necessarily entailed in West's search for "a jurisprudence built upon feminist insights into women's true nature," *id.* at 3-4, a formulation that shows the influence of her biological essentialism, *id.* at 2-3.

It is worth noting that the perception that sameness and difference themes are necessarily in opposition is relatively recent. During the debate over suffrage, sameness and difference arguments were used "in the same breath by the same people, with no perception of conflict." Letter from Suzanne Lebsock to author (Nov. 29, 1988) (on file with author). Why these themes came to be perceived as conflicting and whether this modern tendency should be perpetuated are important questions for contemporary theorists. I am grateful for this point to Suzanne Lebsock.

3. B. FRIEDAN, *THE FEMININE MYSTIQUE* (1963). For a discussion of the breadth of the resurgence of feminism in the 1960s, see *THE NEW FEMINISM IN TWENTIETH-CENTURY AMERICA* (J. Sochen ed. 1971). It should be noted that Friedan has substantially changed her focus. See B. FRIEDAN, *THE SECOND STAGE* 38-41, 83-87 (1981).

4. See, e.g., Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 606 (1977). Wasserstrom's comparison of sex to eye color is often criticized by feminists of difference, who argue that something would be lost if sex were treated as a factor as irrelevant as eye color. See, e.g., E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* 22-23 (1980); Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1139 (1986); Littleton, *supra* note 2, at 1291.

5. See *infra* text accompanying notes 119-25.

similationists' traditional focus on gender-neutrality may have rendered women more vulnerable to certain gender-related disabilities that have important economic consequences.⁶ The second phenomenon that plays a central role in the current feminist imagination is that of career women "choosing" to abandon or subordinate their careers so they can spend time with their small children.⁷ These phenomena highlight the fact that deep-seated social differences continue to encourage men and women to make quite different choices with respect to work and family. Thus, "sameness" scholars are increasingly confronted by the existence of gender differences.

Do these challenges to assimilationism prove that we should stop trying to kid ourselves and admit the "real" differences between men and women, as the popular press drums into us day after day, and as the "feminism of difference" appears to confirm?⁸ Do such phenomena mean that feminists' traditional focus on gender-neutrality is a bankrupt ideal? I will argue no on both counts, taking an approach quite different from that ordinarily taken by feminists on the sameness side of the spectrum. "Sameness" feminists usually have responded to the feminists of difference by reiterating their basic insight that individual men and women can be very similar. While true, this is not an adequate response to the basic insight of "difference" feminists: that gender exists, that men and women differ as groups. In this article, I try to speak to feminists of difference on their own terms. While I take gender seriously, I disagree with the description of gender provided by difference feminists.

I begin in Part I by challenging the widely influential description of gender advocated by Carol Gilligan. I suggest that Gilligan's description of "women's voice" is less a description of women's psychology than an attempt to attribute to women two influential critiques of contemporary Western culture. One is the critique of traditional Western

6. See *infra* text accompanying notes 172-74.

7. See A. CARDOZO, SEQUENCING (1986); Rimer, *Sequencing: Putting Careers on Hold*, N.Y. Times, Sept. 23, 1988, at A21, col. 1; Hickey, *The Dilemma of Having It All*, WASH. LAW., May-June 1988, at 38; Fierst, *Careers and Kids*, MS. MAGAZINE, May 1988, at 62; Kantrowitz, *A Mother's Choice*, NEWSWEEK, Mar. 31, 1988, at 46; E. WOLGAST, *supra* note 4, at 156.

8. See, e.g., Barber, *Beyond the Feminist Mystique*, NEW REPUBLIC, July 11, 1983, at 26, *passim*; Friedan, *How To Get the Women's Movement Moving Again*, N.Y. Times, Nov. 3, 1985 (Magazine), at 26; Salholtz, *Feminism's Identity Crisis*, NEWSWEEK, Mar. 31, 1988, at 58; Brubach, *Men Will Be Men*, ATLANTIC MONTHLY, Apr. 1983, at 118, 124; Ciulla, *Corporate Leadership: Try a Little Tenderness*, PSYCHOLOGY TODAY, Mar. 1986, at 74; Lubin, *Superwomen of the Financial World*, WORKING WOMAN, Sept. 1984, at 161, 166; Gilligan, *Why Should a Woman Be More Like a Man?*, PSYCHOLOGY TODAY, June 1982, at 68; Hickey, *supra* note 7, *passim*; see also responses published under the title of *Parenting & the Law*, WASH. LAW., Sept.-Oct. 1988, at 46; D. KIRP, M. YUDOF & M. FRANKS, GENDER JUSTICE 113 (1986); cf. B. FRIEDAN, THE SECOND STAGE, *supra* note 3, at 86.

epistemology. I argue that it is incorrect as a matter of intellectual history to claim, as have Gilligan and others, that the twentieth century's shift to a more contextualizing, antiformalist, and relativizing form of discourse constitutes a rejection of absolutist "male" epistemology in favor of "women's voice." The second critique Gilligan claims for women, the critique of possessive individualism, presents more subtle issues. Unlike the critique of traditional epistemology, the critique of possessive individualism *has* traditionally been associated with women. Gilligan's description of gender differences reclaims this critique for women through an updated version of the Victorian ideology of domesticity, whose attraction for modern feminists lies in its perceived potential "to transform our polity and its underlying assumptions [away] from the alienated world of atomistic competition. . . ."⁹ This critique of individualism is one well worth exploring. But its power is undermined when modern feminists adopt domesticity's peculiarly domesticated version of the critique. The perils of modern domesticity become apparent in an analysis of the recent Title VII case of *Equal Employment Opportunity Commission (EEOC) v. Sears, Roebuck & Co.*¹⁰ This case provides ample evidence of how domesticity's critique of possessive individualism serves to marginalize both women and the critique itself.

While Part I challenges the description of gender differences offered by Gilligan feminists, it does not deny the existence of gender differences. Gender differences do exist: that is, men *as a group* differ from women *as a group* not only on the basis of biological "sex" differences, but on the basis of social "gender" differences.¹¹ What I reject

9. Comments of Paul J. Spiegelman, *James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFFALO L. REV. 36 (1985) [hereinafter *A Conversation*].

10. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

11. Some influential feminists have denied the importance of the distinction between sex and gender by arguing in effect that most (or all) of the important differences between men and women are biological as opposed to social. See, e.g., E. WOLGAST, *supra* note 4, at 26. Perhaps the most influential author to take this position currently is Robin West. See West, *supra* note 2, at 2-3. West stands by her claim that the behavior differences between men and women are biological, not social even when, in the last pages of her article, she modifies her "separation" thesis with an admission that men as well as women are focused on connection as well as separation. To me this suggests that a focus on connection is not determined by biology (*i.e.*, sex) but by socialization (*i.e.*, gender). West, however, assumes that if men are "connective," there must be a biological reason: she attributes their connectivity to the fact of men's attachment to their mothers through the umbilical cord. Are we to conclude that women are more "connective" than men because, whereas men spend only nine months biologically connected to another human being, women who become mothers spend another nine months for each child they bear — more if they nurse and we count nursing as "connective" (as West does)? Are adoptive mothers then less "connective" than biological mothers?

West's biological determinism, in addition to singling out biological mothers who nurse as the ideal life form, leads her to the somewhat strange assertion that one of the unique "connective"

is Gilligan's description of gender differences, which I think is inaccurate and potentially destructive.

The chief strength of the feminism of difference is its challenge to what have been called male norms. Part II demonstrates how these norms can be challenged without resort to domesticity. I begin from Catharine MacKinnon's description of gender as a system of power relations. While MacKinnon focuses on sexuality, I return to a more traditional topic: the relationship between work and family responsibilities. I argue that these issues are at the core of the contemporary gender system, which systematically enriches men at the expense of women and children. Problems such as the feminization of poverty stem in substantial part from a wage-labor system premised on an ideal worker with no family responsibilities. Experiences of the past decade have shown that women can only enter the labor force without insisting on a redefinition of the ideal worker at the expense of failing to meet the ideal.

Yet the gendered structure of wage labor is not being challenged. More astonishing, difference feminists celebrate a women's culture that encourages women to "choose" economic marginalization and celebrate that choice as a badge of virtue. The notion that women "choose" to become marginalized (nonideal) workers clouds the fact that all workers currently are limited to two unacceptable choices: the traditional male life pattern or women's traditional economic vulnerability. Wage labor does not have to be structured in this way. Changing it should be a central thrust of a feminist program.

In Part III, I continue to develop this alternative vision of gender. I first discuss the rejection by MacKinnon and others of the traditional feminist goal of gender neutrality. Its critics have argued that gender neutrality mandates a blindness to gender realities and so inhibits attempts to help women victimized by gender. I redefine the traditional

experiences for women is sexual intercourse. Whom are they connected to? Are not men by definition also connected? And in what sense is menstruation "connection," as West claims?

West does not seem to realize that she is dealing not with biology but with metaphor. She uses metaphors drawn from human experience to argue that experiences (notably childbirth) lead human beings to certain values, notably "connectivity." Isn't that true only if those people interpret the biological experiences West discusses in the same way she does? Pregnancy indeed represents an opportunity for human beings to recognize the beauty of their connections with others. Indeed, for me, one of the unadvertised beauties of pregnancy was the opportunity to feel a connection not only with the baby, but with the human community at large. Pregnancy, I kept saying, was like hitchhiking — it brought out the best in people, their most caring and communal side. But the point is that women can interpret this aspect of pregnancy (and all others) differently: many professional women interpret strangers' demonstrations of their sense that they too "own" a pregnant woman's tummy as invasive and demeaning. Moreover, women themselves sometimes experience pregnancies (particularly unwanted ones) as invasive. Nonetheless, some of the most influential feminists of difference have shared West's biological determinism.

goal, which in fact does not require neutrality, or blindness, with respect to gender, but rather advocates a consistent refusal to institutionalize a correlation between gender roles and biological sex differences. Thus redefined, the traditional goal has continuing validity, since institutionalizing a correlation between gender and sex necessarily reinforces gender stereotypes and the oppressive gender system as a whole. Moreover, the traditional goal does not preclude helping women disadvantaged by their adherence to gender roles, since such women can be protected in a sex-neutral fashion by protecting all people (regardless of biology) who are victimized by gender.

The article concludes by detailing the limitations of Gilligan's description of gender differences. This discussion responds to comments from some who have heard my analysis and then assumed that I cannot really be denying women's "different voice." I stress that, though I am not denying the existence of gender, I *am* denying the validity of the description of women's voice that Gilligan has provided. In particular I reject Gilligan's core claim that women are focused on relationships while men are not. To the extent this claim pinpoints actual gender differences, I argue it merely reflects the oppressive realities of the current gender system. Beyond that, Gilligan's claim is inaccurate and serves to perpetuate our traditional blindness to the ways in which men are nurturing and women are competitive and power-seeking.

I. THE FEMINISM OF DIFFERENCE

A. Introduction

The most influential source for the feminism of difference is Carol Gilligan's book, in which Gilligan argues that women speak "in a different voice."¹² Women are portrayed as nurturers, defined by their relationships and focused on contextual thinking; men are depicted as abstract thinkers, defined by individual achievement. We should listen to women's "voice," argue Gilligan and her followers, because

12. C. GILLIGAN, *IN A DIFFERENT VOICE* 24-63 (1982). Gilligan is only the most famous of the scholars who have defined gender in psychological terms. Her findings parallel, and presumably were influenced by, the work of Jean Baker Miller, see J.B. MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (2d ed. 1986); see also N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978). All three authors focus in different ways on "connectedness" as a crucial (if not the crucial) gender difference. See C. GILLIGAN, *supra*, at 8-9; J.B. MILLER, *supra*, at 83, 148 n.1; N. CHODOROW, *supra*, at 90-91, 167-70, 178-79. But only Chodorow seems clearly to recognize that what she is talking about is the psychological construction of gender and its costs for women. *Id.* at 213-19.

It is important to place Gilligan's work into historical context. Though I take issue with her conclusions about women's voice, I endorse her fundamental motivation, namely to reverse the previous practice of ignoring women altogether, or treating any differences between men and women as reflecting women's inadequacy. Gilligan's primary contribution was to articulate a modern challenge to "male norms."

women's culture offers the basis for a transformation of our society, a transformation based on the womanly values of responsibility, connection, selflessness, and caring, rather than on separation, autonomy, and hierarchy.¹³

One reason why the feminism of difference has proved so persuasive is that it has claimed for women two of the central critiques of twentieth-century thought. In a strain of argument particularly popular in law reviews, feminists characterize traditional Western epistemology as "male" and identify the twentieth-century critique of that epistemology as an integral part of "women's voice."¹⁴ Gilligan and her followers also identify with women a critique of possessive individualism whose implications have been spelled out in *EEOC v. Sears*.¹⁵

B. *The New Epistemology as Women's Voice*

Gilligan's description is often presented as a rediscovery of obvious differences between men and women we knew about all along.¹⁶ In fact, even feminists of difference disagree about what are the "obvious" differences between men and women. Gilligan's description of women has been so widely adopted¹⁷ that it is easy to overlook the fact

13. See C. GILLIGAN, *supra* note 12, at 19-21, 64-66, 70-71, 82-83.

14. See, e.g., Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N. MEX. L. REV. 613 (1986); Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987); Areen, *A Need for Caring* (Book Review), 86 MICH. L. REV. 1067, 1073 (1988).

15. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd.*, 839 F.2d 302 (7th Cir. 1988).

16. Feminists of difference often set up a rhetorical structure in which their willingness to admit "real" differences is contrasted with the ideological commitment of assimilationists to deny them. See, e.g., D. KIRP, M. YUDOF & M. FRANKS, *supra* note 8, at 113.

17. Gilligan's work has spawned a huge literature. "[T]he very name *Gilligan* has become a buzzword in both academic and feminist circles." Watstein, *Psychology* in 4 THE WOMEN'S ANNUAL 167, 178 (S. Pritchard ed. 1984). Some examples: in psychology, M.F. BELENKY, B. MCVICKER CLINCHY, N.R. GOLDBERGER & J.M. TARULE, *WOMEN'S WAYS OF KNOWING* xi, 7-8 (1986); Lyons, *Two Perspectives: On Self, Relationships, and Morality*, 53 HARV. EDUC. REV. 125 (1983); Sassen, *Success Anxiety in Women: A Constructivist Interpretation of Its Source and Its Significance*, 50 HARV. EDUC. REV. 13, 18 (1980); in social theory: K. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* 159-60 (1984); in ethical theory: N. NODDINGS, *CARING* (1984); in literary criticism: S. O'BRIEN, *WILLA CATHER: THE EMERGING VOICE* (1987); in the media: Van Gelder, *Carol Gilligan: Leader for a Different Kind of Future*, MS. MAGAZINE, Jan. 1984, at 37 (Gilligan was *Ms. Magazine's* "Woman of the Year"); Shreve, *Viva la Difference*, in MacNeil/Lehrer Newshour, June 21, 1988, at 15 (of transcript); in the law: Areen, *supra* note 14; Finley, *supra* note 4, at 1118, 1154, 1158, 1161, 1166-67; Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 480-508; Kornhauser, *supra* note 14, at 507-18; Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERK. WOMEN'S L.J. 39, 41-42 (1985); Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 15 n.37 (1986); Rifkin, *Mediation from a Feminist Perspective: Promise & Problems*, 2 LAW & INEQUALITY: J. THEORY & PRAC. 21, 24 n.14 (1984); Scales, *supra* note 14, at 1374; Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 613-18 (1986); Spiegelman, *Court-Ordered Hiring Quotas After Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in*

that other feminists of difference have offered a sharply different version of women's true nature. Some radical feminists, more influential ten years ago than today, have espoused a view of women dramatically different from Gilligan's. Often using witch imagery, they stress women's intuition, their sexual power, and their alliance with deep forces of irrationality.¹⁸

This portrait of woman as id derives largely from the pre-modern stereotype of woman as the "weaker vessel."¹⁹ Before the mid-eighteenth century, women were viewed not only as physically weaker than men; their intellectual and moral frailty meant they needed men's guidance to protect them from the human propensity for evil. Women's intense sexuality and their fundamental irrationality meant they were in need of outside control, because women in their weakness could be easily tempted. The darkest expression of the traditional view that women unsupervised quickly slipped into collusion with evil was the persecution (during some periods, massive in scale) of women as witches.²⁰

This traditional stereotype of women crystallized after the early modern period into some traditional truths about women. As the *philosophes* of the Enlightenment celebrated logic and reason, women's intellectual inferiority came to be expressed as an inability to engage in rigorous, abstract thinking. The Enlightenment also celebrated reason over emotion, and women's pre-modern alliance with the devil was transmuted into the view that women's limited ability for rational thought meant they were fundamentally emotional creatures.

Employment Discrimination Doctrine, 20 HARV. C.R.-C.L. L. REV. 339, 342 (1985). The grip of Gilligan's description on legal scholars is such that an editor of one women's law review to which this article was submitted indicated she had never before seen an article that disagreed with Gilligan. Telephone conversation with Carrie Newkirk, Article Editor of the BERKELEY WOMEN'S LAW JOURNAL (Sept. 20, 1988). Perhaps Schneider's thoughtful footnote may mark the beginning of a less deferential approach to Gilligan's work. See Schneider, *supra*, at 616 n.140.

18. See, e.g., M. DALY, *PURE LUST* xii, 4-7 (1984); M. DALY, *GYN/ECOLOGY* 220-22 (1978). The French feminists combine elements of domesticity with elements of this earlier image of women. See, e.g., L. IRIGARAY, *THIS SEX WHICH IS NOT ONE* 29, 208-11 (1985).

19. For an introduction, see A. FRASER, *THE WEAKER VESSEL* 1-6 (1984); N. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 201-04 (1977).

20. C. KARLSEN, *THE DEVIL IN THE SHAPE OF A WOMAN* 154-81 (1987); J. DEMOS, *ENTERTAINING SATAN* 60-64, 197-209, 394-95 (1982); J. KLAITS, *SERVANTS OF SATAN* 51-59 (1985); G.R. QUAIFE, *WANTON WENCHES AND WAYWARD WIVES* 14-15, 182-83 (1979); L. ULRICH, *GOOD WIVES* 96-99, 106-12 (1980); Bloch, *Untangling the Roots of Modern Sex Roles: A Survey of Four Centuries of Change*, 4 SIGNS: J. WOMEN CULTURE & SOC'Y. 237, 240-41 (1978); Demos, *Husbands and Wives*, reprinted in J. FRIEDMAN & W. SHADE, *OUR AMERICAN SISTERS: WOMEN IN AMERICAN LIFE AND THOUGHT* 41-42 (1982). Pre-nineteenth-century women also had a very different relationship to commerce (which itself was not yet capitalistic). See Ulrich, *Housewife and Gadder: Themes of Self-Sufficiency and Community in Eighteenth-Century New England*, in *TO TOIL THE LIVELONG DAY* (C. Groneman & M.B. Norton eds. 1987).

These stereotypes have provided the link for many feminists of difference between women and the critique of traditional Western epistemology.²¹ This critique, which I have elsewhere called the new epistemology,²² consists of a broad and diverse intellectual movement that rejects a range of long-standing Western verities, some dating to the Enlightenment, and others all the way back to Plato. Perhaps the core element of the new epistemology is its rejection of an absolute truth accessible through rigorous, logical manipulation of abstractions.²³ Feminists of difference have characterized the new epistemology with women's voice, noting that women traditionally have been thought to eschew abstraction for sensitivity to context, and to eschew logic for a faith in emotion and intuition as tools of thought.²⁴

On closer inspection, however, the traditional stereotype of women as overly emotional and incapable of rational, abstract thought is quite different from the critique proffered by the new epistemology: feminists are being highly selective in the aspects of the traditional stereotype they choose to stress. It is true there are some similarities between the traditional stereotype of women and the new epistemology. Both share a sense of the limitations of pure logic and a faith in contextual thinking.²⁵ But feminists of difference submerge the fact that the thinkers who have developed the new epistemology have, by and large, been cerebral and detached in the extreme. Neither they nor the new epistemology fits the traditional stereotype of women as too emotional for sustained rational thought. What the new epistemologists are talking about is a new kind of rationality, one not so closely tied to abstract, transcendental truths, one that does not exclude so much of human experience as Western rationality traditionally has done. The ideal they propose represents a broadening of traditional intellectual life, whereas the traditional caricature of women as emotional and irrational represents a formal marginalization of those characteristics of human personality that the Western tradition has devalued.²⁶

21. See generally A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 364-84 (1983); A. JAGGAR, *FEMINIST PERSPECTIVE IN THE ACADEMY* (E. Langland & W. Gove eds. 1981); S. HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986); C. MCMILLAN, *WOMEN, REASON, AND NATURE* (1982); Vickers, *Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research*, in *FEMINISM IN CANADA: FROM PRESSURE TO POLITICS* (G. Ginn & A. Miles eds. 1982).

22. See Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).

23. *Id.* at 432-34.

24. See sources cited *supra* note 14.

25. See, e.g., W.W. BARTLEY, III, *WITTGENSTEIN* 48, 139-58, 187-91 (1985).

26. The most sophisticated of the feminist scholars who link traditional rationalism with

Thus, this attempt to rehabilitate traditional stereotypes as "women's voice," and to associate women's voice with the new epistemology, fails to come to terms with the extent to which the gender stereotypes were designed to marginalize women. These stereotypes no doubt articulated some values shunted aside by Western culture. But the circumstances of their birth mean they presented a challenge to predominant Western values that was designed to fail, and to marginalize women in the process.

At a simpler level, the attempt to claim the new epistemology for women is unconvincing simply because the new epistemology has been developed largely by men. These include philosophers from Frederick Nietzsche and the American pragmatists to Martin Heidegger and Ludwig Wittgenstein, all of whom helped develop the movement's critique of absolutes.²⁷ Important figures in developing the new epistemology's view of truths as necessarily partial and contextual include the fathers of post-Newtonian physics (Albert Einstein and Max Planck), the linguists Benjamin Whorf and Ferdinand de Saussure, and Wittgenstein, who rejected the "picture theory" that Truth is an objective picture of reality in favor of the view that a multiplicity of truths exists as an integral part of culture and context.²⁸

Note that all these scholars, and most others who were seminal in articulating the basic outlook of the new epistemology, are male. This history is no news to relational feminists, who regularly cite Wittgenstein and others as sources of inspiration.²⁹ In what sense, then, is this vast epistemological shift "feminist" or even "feminine"? The simple answer is that the new epistemology is not in any meaningful way "women's voice."

C. *Women's Voice and the Critique of Possessive Individualism*

1. *The Feminism of Difference as a Resurgence of Domesticity*

The traditional stereotype of women, designed to justify women's subservience in a society that saw hierarchies as natural and desirable, came during the course of the eighteenth century to seem inconsistent with the emerging political philosophy of liberalism, which held all

males is the historian of science (a scientist herself) Evelyn Fox Keller. See E.F. KELLER, REFLECTIONS ON GENDER AND SCIENCE 61-65 (1985). Keller convincingly argues that the ideology of science developed as part and parcel of a new gender system in the early modern era. But this does not establish, as she and others seem to assume, that the new epistemology (which is a critique of that system of science in the sense that science built upon the tenets of traditional epistemology) is "female" in any meaningful sense.

27. See Williams, *supra* note 22, at 435-39.

28. See *id.* at 439-53.

29. See, e.g., Scales, *supra* note 14, at 1374 n.3.

men as equal.³⁰ Gradually a new gender ideology, the ideology of domesticity, developed in which women continued to be viewed as weaker than men physically and intellectually, but were newly extolled as more moral than men.³¹

Gilligan echoes domesticity's "discovery" of women's higher morality. Unlike the Victorians, Gilligan does not argue explicitly that women's morality is of a higher order: she articulates her ideal as a "dialectic mixture" of the male and female "voices." Yet commentators have noted the striking resemblance between Gilligan's ideal morality and her description of female emotional maturity.³² An emotionally mature woman, it seems, will reach Gilligan's ideal moral state automatically, while men will attain it only through a fundamental restructuring of their gender identity.

A close analysis of the traits Gilligan attributes to women suggests that she and other scholars who share her view of women offer domesticity with a difference. These "relational feminists,"³³ as they have been aptly called, reclaim the compliments of Victorian gender ideology while rejecting its insults. Thus, relational feminists agree with the Victorians that women are more nurturing than men ("focused on relationships"), less tied to the questionable virtues of capitalism, and ultimately more moral than men. But they disagree with the Victorians' view that women are also more passive than men, less competent, more timid and naturally demure.

Relational feminism has had a pervasive impact on women's history, and it is a historian of women who has best illustrated its relation to the ideology of domesticity. One of the major achievements of relational feminism in women's history is Suzanne Lebsock's subtle and

30. See Bloch, *supra* note 20, at 241 (hierarchy as natural); L. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA 13-15 (1980). Kerber describes the initial accommodation between liberalism and gender in the concept of republican motherhood. See L. KERBER, *supra*, at 265-88.

31. See Baker, *The Domestication of Politics: Women and American Political Society, 1780-1920*, 89 AM. HIST. REV. 620 (1984); N. COTT, *supra* note 19; Bloch, *supra* note 20, at 249-50. This description is an oversimplification. Domesticity changed the image of white, middle-class women, but the older stereotype lived on. It continued to be applied to lower-class women, to black women, and to white middle-class women who violated the code of female behavior mandated by domesticity. These themes are astutely explored in Hall, "The Mind That Burns in Each Body": Women, Rape and Racial Violence, and Peiss, "Charity Girls" and City Pleasures: Historical Notes on Working-Class Sexuality, 1880-1920, in POWERS OF DESIRE (A. Snitow, C. Stansell & S. Thompson eds. 1983).

32. See Auerbach, Blum, Smith & Williams, *Commentary on Gilligan's In A Different Voice*, 11 FEM. STUD. 149, 156-59 (1985); see also Ehrenreich, *Accidental Suicide* (Book Review), ATLANTIC, Oct. 1986, at 98, 100 (Gilligan's work being used "to re-open the old case for women's absolute moral superiority"); Kerber, *Some Cautionary Words for Historians*, 11 SIGNS: J. WOMEN CULTURE & SOC. 304, 309 (1986).

33. Offen, *Defining Feminism: A Comparative Approach*, 14 SIGNS: J. WOMEN CULTURE & SOC. 119, 135 (1988).

persuasive study of a small Virginia town before the Civil War. In *The Free Women of Petersburg*, Lebsock summarizes her conclusions about women's values in the pre-Civil War period as follows:³⁴

[H]ere, in one list, are the documentable components of a women's value system. Women, more than men, noticed and responded to the needs and merits of particular persons. This showed in their tendency to reward favorite slaves and to distribute their property unevenly among their heirs. It also showed in their ability to make independent judgments about their own fitness to administer estates. Women were particularly sensitive to the interests of other women and to their precarious economic position; this was demonstrated in favoritism toward female heirs and in the establishment of separate estates. As their real estate and credit transactions suggest, women wanted financial security for themselves as well as for others. Beyond that they were not as ego-invested as were men in the control of wealth. Our list grows a bit longer if we add the more ambiguous evidence derived from women's vanguard action in providing relief to the poor and in promoting religion. Women as a group were more invested than were men in Christian communities and the life of the spirit. And in their efforts to give assistance to the poor, both personalism and regard for other women surfaced again; the poor were mainly women and children, most of whom cannot have "deserved" their poverty.

The people who wrote the antebellum period's popular literature have been trying to tell us all along that women were different from men, better than men in some respects. Perhaps it is time we took their message more seriously.³⁵

Lebsock's book, published shortly after Gilligan's, comes to some strikingly similar conclusions.³⁶ Both authors conclude that women are more focused on relationships than are men, and both suggest that women's is a higher morality. But Lebsock differs from Gilligan, and from most other relational feminists, in her awareness that she is reclaiming stereotypes from domesticity. Unlike scholars who have glossed over the Victorians' negative characterizations of women, Lebsock confronts them directly, and her conclusions are instructive. She asserts that women were not uniformly inept; many were active and competent as executors of their husbands' estates. Nor were they passive as investors; only risk-averse. When it comes to the positive attributes of Victorian gender stereotypes, Lebsock's conclusions differ. She concludes that women were characterized by a "personalism" that made them more sensitive to slaves, the poor, and vulnerability in

34. S. LEBSOCK, *THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784-1860* (1984). Lebsock won the prestigious Bancroft Prize for this work.

35. *Id.* at 142-43.

36. Lebsock's research was done over an eight-year period, during which Gilligan also was developing her ideas.

other women, less involved in capitalist values and (consequently?) more moral than men.

Lebsock thus rejects the insults of Victorian gender ideology but embraces those elements complimentary to women. So do most feminists of difference, though few make their selectivity so clear. Moreover, relational feminists often seem unaware of their own selectivity. "Perhaps it is time we took [the antebellum] message more seriously," Lebsock argues, forgetting the half of the antebellum message she rejects. In this she is joined by the majority of relational feminists.³⁷

Given the decision to rehabilitate domesticity's gender stereotypes, it is not surprising that relational feminists choose domesticity's compliments over its insults. But this veils the deeper question: Why return to domesticity at all?

In answer let us start with a telling exchange between Carol Gilligan and Catharine MacKinnon in the 1984 "conversation" held at the Buffalo School of Law.³⁸ In a discussion of Jake, Gilligan's typical male, and Amy, her typical female, Gilligan argued that her goal was to assimilate Amy's voice into the mainstream of society. MacKinnon responded that her goal was more to have Amy develop a new voice, one that "would articulate what she cannot now, because his foot is on her throat." Gilligan's Amy, said MacKinnon, "is articulating the feminine. And you are calling it hers. That's what I find infuriating." "No," replied Gilligan, "I am saying she is articulating a set of values which are very positive."³⁹

Note Gilligan's assumption that because what she has found is "very positive," she cannot have found "the feminine" — *i.e.* conventional gender stereotypes derived from domesticity. MacKinnon is right that what Gilligan has found is femininity; Gilligan is right that there is something positive there.

37. The one Victorian compliment relational feminists have rejected is the view of women as passionless. The classic study of the different cultural meaning of asexuality is Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-1850*, in N. COTT & E. PLECK, *A HERITAGE OF HER OWN* (1979).

38. Conversation between Carol Gilligan and Catharine MacKinnon, Mitchell Lecture Series, State University of New York at Buffalo School of Law (Nov. 20, 1984), *reprinted in A Conversation*, *supra* note 9, at 11.

39. *Id.*

2. Domesticity as a Critique of Possessive Individualism⁴⁰

The conventional wisdom among the "sameness" contingent⁴¹ is that relational feminists in their celebration of women's voice are simply basking in self-congratulation. I think this misses the mark. Relational feminists' interest in "the feminine" stems from its transformative potential.⁴² Relational feminists find enshrined in domesticity "female" values that, they believe, will enable women to achieve equality not by buying into the male world on male terms, but by transforming the world in women's image. Thus Kathy Ferguson in *The Feminist Case Against Bureaucracy*⁴³ asserts that feminist theory "can provide for a reconceptualization of some of the most basic terms of political life."⁴⁴ Carrie Menkel-Meadow, a leading disciple of Gilligan within the legal community, hopes to restructure the legal system to express the values of "Portia's" voice.⁴⁵ Robin West recommends a new focus on connectedness and intimacy.⁴⁶ Other relational feminists go further and argue that women's voice is the best hope for

40. The term "possessive individualism" comes from C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 3, 263-64 (1962). The term refers to the liberal premises that society consists of market relations, and that freedom means freedom from any relations with others except those relations the individual enters voluntarily with a view to his own self-interest.

41. I don't mean to imply that MacKinnon is one of the "sameness" contingent. She is not. See C. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED* 33-45 (1987). The relationship between MacKinnon's viewpoint and relational feminism is aptly capsulized by Robin West. See West, *supra* note 2, at 15.

42. Although Gilligan herself sends mixed messages, see *infra* text accompanying notes 61-62, her recent comments show that she diverges from many of her followers in a significant way on the issue of the transformative potential of "women's voice." She has from the beginning acknowledged that both men and women face challenges, though they are different ones, in achieving emotional maturity. Men need to appreciate relationships while women need to realize that a caring and nurturing outlook should include their own, as well as others', needs. See *A Conversation*, *supra* note 9, at 35, 45-46.

43. K. FERGUSON, *supra* note 17.

44. *Id.* at 166; accord Spiegelman, *supra* note 17, at 422-24. Gilligan herself believes that many current institutions would benefit from hearing "women's voice." See, e.g., Comments by Carol Gilligan, in *A Conversation*, *supra* note 9, at 63. In other contexts, though, she has acknowledged MacKinnon's charge that women's "voice" is the "voice of the victim," as, for example, when she argued in *In a Different Voice* that women need to have more respect for their own autonomy. See C. GILLIGAN, *supra* note 12, at 151-74; see also Comments by Catherine MacKinnon, in *A Conversation*, *supra* note 9, at 27.

45. Menkel-Meadow, *supra* note 17, at 43. Other commentators have argued that law is "male." See, e.g., Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980); Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW* 294 (D. Kairys ed. 1982). The view of law as "male" comes up repeatedly in some feminist contexts. For an intelligent protest, see F. Olsen, *The Sex of Law* (1984) (unpublished paper given to the Section on Women and the Law, American Association of Law Schools Annual Meeting, Jan. 6, 1985). MacKinnon appears to agree with the characterization of law as male. See MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y. 635, 645 (1983).

46. See West, *supra* note 2, at 65.

the future of the planet. But Suzanne Lebsock, as usual, says it best: "If we find that all along women have managed to create and sustain countercultures, then the chances increase that as women come to power, a more humane social order will indeed come with them."⁴⁷

For all these feminists, this "more humane social order" entails a new ethic of care⁴⁸ based on a focus on relationships, not competition; on negotiation, not combat; on community, not individual self-interest.⁴⁹ "What is needed," concludes the early and influential feminist of difference Elizabeth Wolgast, "is another model We need a model that acknowledges . . . other kinds of interest than self-interest."⁵⁰ A more recent legal feminist echoes this thought, noting his aspiration "to transform our polity and its underlying assumptions from the alienated world of atomistic competition to an interconnected world of mutual cooperation."⁵¹ The model being rejected is possessive individualism.

If we examine the transformation proposed by relational feminists, we uncover a critique of this model that dates back to the original version of domesticity. Historians have long known that domestic ideology presented a challenge to the capitalist mainstream of American society. Said Daniel Scott Smith in 1973:

Instead of postulating woman as an atom in competitive society, [the Victorians] viewed women as a person in the context of relationships with others. By defining the family as a community, this ideology allowed women to engage in something of a critique of male, materialistic, market society and simultaneously proceed to seize power within the family.⁵²

In 1977, historian Nancy Cott worked out in detail the way domesticity functioned as an internal critique of capitalism. She linked the in-

47. S. LEB SOCK, *supra* note 34, at 144. Lebsock's claims are modest: "This is a hopeful vision," she continues, "but not necessarily a utopian one; we may be talking about the realm of small improvement." Other feminists are more openly utopian. An example is Representative Patricia Schroeder's statement that "doing something about women's poverty won't make the gender gap disappear. Women will still worry that unless we change the old caveman rules, we will all be blown up." O'Reilly, *Getting a Gender Message*, Time, July 25, 1983, at 12. Other feminists are more aggressive in their claims for the transformative potential of women's voice. See, e.g., West, *supra* note 2, at 65.

48. See N. NODDINGS, *supra* note 17, *passim*; Areen, *supra* note 14.

49. See, e.g., Karst, *supra* note 17, at 486-95; Menkel-Meadow, *supra* note 17, at 50-55; C. GILLIGAN, *supra* note 12, at 29; West, *supra* note 2, at 37. West makes it explicit that she sees feminism as the way out of liberalism (within which category she includes critical legal studies, as the "unofficial story"). How feminists differ from critical legal scholars in their yearning for a vision of community and connection she makes less clear.

50. E. WOLGAST, *supra* note 4, at 156.

51. Comments of Paul J. Spiegelman, *A Conversation*, *supra* note 9, at 36.

52. Smith, *Family Limitation, Sexual Control, and Domestic Feminism in Victorian America*, in A HERITAGE OF HER OWN, *supra* note 37, at 222, 238-39. Cf. N. CHODOROW, *supra* note 12, at 213.

vention of domestic ideology with changes in work patterns that accompanied the industrial revolution. Cott argued that domesticity developed in conjunction with the shift from traditional "task-oriented" work, which mixed labor and leisure, to modern "time-disciplined" wage labor, which isolates work both temporally and geographically from family life. She argued that domestic ideology set up the home as a haven from the heartless world of nineteenth-century capitalism.

In accentuating the split between "work" and "home" and proposing the latter as a place of salvation, the canon of domesticity tacitly acknowledged the capacity of modern work to desecrate the human spirit. Authors of domestic literature, especially the female authors, denigrated business and politics as arenas of selfishness, exertion, embarrassment, and degradation of soul. These rhetoricians suggested what Marx's analysis of alienated labor in the 1840s would assert, that "the worker . . . feels at ease only outside work, and during work he is outside himself. He is at home when he is not working and when he is working he is not at home." The canon of domesticity embodied a protest against that advance of exploitation and pecuniary values.⁵³

Cott's description of domesticity as a "*cri de coeur* against modern work relations" suggests that domesticity has from the beginning functioned as an internal critique of Western capitalism.⁵⁴ Gilligan and her followers carry on this tradition in their visions of the future that extol connection, cooperation, and community (the "values of the web") and aspire to overcome competition and self-interest.⁵⁵

Gilligan picks up not only domesticity's claim that women offer an alternative to capitalism, but also its stereotype of men as capitalists *par excellence*. "For men," Gilligan asserts, "the moral imperative appears . . . as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfillment."⁵⁶ By labelling as "male" the "morality of rights and noninterference," Gilligan links men with the liberal ideology that underlies American capitalism.⁵⁷ Gilligan also attributes to men the liberal premise that the world is one of "people standing alone,"⁵⁸ arguing, in effect, that men accept liberalism's vision of society as a set of preconstituted individuals who choose to associate for limited purposes. Hence Jake, Gilligan's typical male, is "concerned with limiting interference" and

53. N. COTT, *supra* note 19, at 67-68; see also C. LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1977).

54. N. COTT, *supra* note 19, at 70; see also Baker, *supra* note 31, at 620.

55. C. GILLIGAN, *supra* note 12, at 17, 62-63.

56. *Id.* at 100.

57. *Id.* at 22.

58. *Id.* at 29.

places a high value on separation and autonomy.⁵⁹ Gilligan associates the male voice with the pursuit of self-interest, and, therefore, with capitalism's central tenet that this pursuit will benefit society as a whole.⁶⁰

Relational feminism is better understood as a critique of possessive individualism than as a description of what men and women are actually like. Gilligan herself acknowledges this when she refuses to associate her "voices" with males and females.⁶¹ Yet Gilligan appears not to heed her own warnings on this point, for in the remainder of her book she invariably associates men with one voice and women with the other, and often makes sweeping statements about the way men and women "are."⁶² Gilligan's inconsistent signals about whether she is talking about women or "the feminine" have left relational feminism with the potential to be used as a weapon against women. As evidence of this, I next turn to the *Sears* case, a clear example of the perils of modern domesticity.

3. EEOC v. Sears: *The Perils of Modern Domesticity*

In *EEOC v. Sears, Roebuck & Co.*,⁶³ Sears argued successfully that women were underrepresented in its relatively high-paying commission sales positions not because Sears had discriminated against them, but because women lacked "interest" in commission sales. Sears used the language of relational feminism to support its core argument that women's focus on relationships at home and at work makes them

59. *Id.* at 38.

60. *Id.* at 35, 79.

61. *Id.* at 2. This is a standard disclaimer. See, e.g., Karst, *supra* note 17, at 483; Menkel-Meadow, *supra* note 17, at 41. But the disclaimer does not solve the underlying problem. Even if one accepts that these descriptions accurately describe gender differences (which I do not, see *infra* text accompanying notes 181-90), neither Gilligan nor her followers explain why men and women whose behavior does not adhere to gender stereotypes should be denied the dignity of being "real" men or "real" women (which they are when those with a "different voice" are systematically referred to as "women" and those with the other voice are systematically referred to as "men"). Although I suspect Gilligan herself might blanch at the practice, some relational feminists explicitly police the stereotype of women they advocate by calling "male-identified" any feminist who disagrees with their characterization of women. For a polite example, see Littleton, *supra* note 2, at 1280. This kind of gender-policing epithet, parallel to the Victorian use of the word "unladylike," makes explicit the assumption that women who do not speak in "women's voice" are somehow not "real" women. Note also that part of the power of the modern epithet "male-identified" is its assertion that a woman without "women's voice" is a man. This insult reflects a gender system that (a) mandates correlation of behavior patterns with genitals and (b) consequently admits of only two, consistently dichotomous, behavior patterns.

There is evidence Gilligan is becoming increasingly uneasy about her claim that "women's voice" is gendered. See Comments of Paul J. Spiegelman, *A Conversation*, *supra* note 9, at 48.

62. Nel Noddings is more successful than most relational feminists at following through her statement that the "caring" ethics she advocates is available, and in fact practiced, by both men and women. See N. NODDINGS, *supra* note 17, at 2.

63. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

choose to sacrifice worldly advancement in favor of a supportive work environment and limited hours that accommodate their devotion to family.⁶⁴ An unmistakable undertone is Sears' subtle intimation that women's sacrifice is limited, since their "different voice" makes the fast track unappealing. Women's "ethic of care" enables them to rise above the fray, so they are not truly hurt when they are excluded from high-powered, competitive jobs in commission sales.⁶⁵

The brilliance of Sears' lawyers lies in their success in enshrining gender stereotypes at the core of Title VII.⁶⁶ *Sears* provides a dramatic illustration of the power of relational feminism to provide a respectable academic language in which to dignify traditional stereotypes. The case holds the potential to transform Title VII law in a way that pits gender discrimination plaintiffs against stereotypes in a battle the stereotypes are designed to win, for in effect *Sears* establishes a legal assumption that all women fit gender stereotypes and imposes on plaintiffs a burden to disprove that assumption as part of their prima facie case. Understanding the potential impact of *Sears* requires some background in Title VII law.

The usual focus of a Title VII class action lawsuit is on statistics comparing the proportion of women in a given job category with the proportion of women in the relevant labor market. Statistics are direct proof that a facially neutral hiring policy has a disparate impact on a group protected under Title VII.⁶⁷ Statistics also are evidence of intent, as is illustrated by the "billiard ball" example. Say one begins with a barrel containing 50 black and 50 white billiard balls. If balls were removed in a random fashion, one would expect half black and half white balls to be chosen. The further the results are from a 50/50 split, the greater the likelihood some other factor is at work. Because defendants who discriminate are rarely open about it, the law helps plaintiffs through a presumption that the "other factor" involved is discrimination. Thus, courts have required only evidence of a statistically significant disparity by a plaintiff to establish a prima facie case

64. This argument was made most clearly through the testimony of Rosalind Rosenberg. See Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg at paras. 11, 16-22, *EEOC v. Sears* (No. 79-C-4373). Sears' testimony at times made it seem that all women prefer part-time work.

65. See *id.* at paras. 16-22. Another Title VII defendant successfully used a similar interest argument in *EEOC v. General Tel. Co. of Northwest, Inc.*, 40 Fair Empl. Prac. Cas. (BNA) 1533 (W.D. Wash. 1985), *aff'd.*, 45 Fair Empl. Prac. Cas. (BNA) 1888 (9th Cir. 1988) (unpublished opinion).

66. 42 U.S.C. §§ 2000e-2000e-17 (1982).

67. I'm simplifying for clarity. In individual cases, of course, what the relevant labor market is can be a subject of hot contention. See D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 44-49, 102-41 (1980).

of discrimination.⁶⁸ Thereafter, the burden shifts to the defendant to articulate some nondiscriminatory reason for the disparity documented.⁶⁹

In contrast to courts prior to *Sears*, both the trial and appellate *Sears* courts required the EEOC to prove not only statistical disparities but also men's and women's "equal interest."⁷⁰ Under *Sears*, therefore, a class of gender discrimination plaintiffs cannot prove their prima facie case simply by proving a disparity between the proportion of women in the relevant labor market and the proportion of women in the jobs at issue. Instead they have the additional burden of establishing what percentage of women in the otherwise relevant labor market was truly "interested" in the jobs at issue.

Sears based its argument, first, upon testimony of managers, one of whom made the now famous claim that women did not want commission sales jobs because such salesmen were required to work outside the store and women do not like to go out when "it's snowing or raining or whatever."⁷¹ The managers' testimony was bolstered by a sociologist who testified about a survey of *Sears* employees,⁷² by a writer on women's issues,⁷³ and by historian Rosalind Rosenberg, who cited Gilligan and other relational feminists to support her assertion that the EEOC's "assumption that women and men have identical interests and aspirations regarding work is incorrect. Historically, men and women have had different interests, goals and aspirations regarding work."⁷⁴

To support this statement, Rosenberg offered portraits of men and women that closely echoed Gilligan's. Women she depicted as "humane and nurturing," focused on relationships, and averse to capitalist virtues such as competition.⁷⁵ Again echoing Gilligan, she painted men as competitive and motivated by self-interest: possessive individ-

68. For a good general discussion, see Boardman & Vining, *The Role of Probative Statistics in Employment Discrimination Cases*, 46 LAW & CONTEMP. PROBS., Autumn 1983, at 189; for an advanced discussion, see D. BALDUS & J. COLE, *supra* note 67, at 26-31, 290-93.

69. See D. BALDUS & J. COLE, *supra* note 67, at 27.

70. See 628 F. Supp. at 1305-15; 839 F.2d at 320-21.

71. Trial Transcript at 8439, Testimony of Ray Graham, EEOC v. *Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986) (No. 79-C-4373), *aff'd.*, 839 F.2d 302 (7th Cir. 1988). Graham, *Sears*' corporate director of equal opportunity, repeatedly expressed the opinion that some jobs (hardware, for example) have "natural appeal" for men, *id.* at 8435, while others (draperies) are "a natural" for women, *id.* at 8432. His assessments were based on assertions that women are averse to competition, *id.* at 8433, and pressure, *id.* at 8434-35.

72. See EEOC v. *Sears*, 628 F. Supp. at 1308-13.

73. 628 F. Supp. at 1307.

74. Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, at para. 1, EEOC v. *Sears* (No. 79-C-4373).

75. *Id.* at paras. 16-22.

ualists *par excellence*.⁷⁶

Sears proceeded to use against women the gender stereotypes rehabilitated by relational feminism.⁷⁷ The implication of Sears' successful use of domesticity's insults is that relational feminists delude themselves if they think they can rehabilitate domesticity's compliments without its insults. To relational feminists, the key point of domesticity may be women's higher morality; to Sears managers it was that women are weak and dependent, delicate and passive.

A closer look at the trial transcript dramatizes the power of these stereotypes once unleashed, for it shows how Sears systematically used stereotypes to override information about the desires and the aspirations of actual women. The most obvious example of this occurs in the testimony of Joan Haworth, Sears' major statistical witness, who argued that even female applicants who appeared to be interested in commission sales, in fact, were not interested. When the EEOC challenged this statement, Haworth chose three applications that indicated background and experience in commission sales and explained how she knew none was truly interested.⁷⁸ The EEOC located two of the three women Haworth discussed, both of whom testified they had in fact been seeking jobs in commission sales.⁷⁹ The trial judge glossed over this rebuttal in his opinion.⁸⁰

76. *Id.*

77. Some thoughtful comments on drafts of this paper have suggested that all *Sears* proves is that relational feminism can be misused. I disagree. The fact that stereotypes drawn from relational feminism can so successfully be used against women suggests, to me, their inherent limitations (namely, that they were designed to be used against women), not that Rosenberg and Nordberg distorted Gilligan's imagery. I want to stress that my charge that Gilligan's description of gender is inaccurate and potentially harmful does not mean that I think feminists should stop exploring gender differences, see *infra* text accompanying notes 181-90; it means only that our explorations should break free from the grip of verities derived from domestic ideology.

In addition to using domesticity's compliments against women, Sears also subtly mobilized the insults that are an integral part of the traditional stereotypes. Rosenberg notes women's traditional association with dependence, *id.* at para. 17; Ray Graham's testimony is pervaded by notions of women as weak, Trial Transcript at 8425-26, 8436, delicate, *id.* at 8425, 8439, and vulnerable, *id.* at 8435, 8438, *EEOC v. Sears* (No. 79-C-4373). Other managers also stressed women's sexual vulnerability, see Offer of Proof Concerning the Testimony of Thomas Biczak at para. 26, *EEOC v. Sears* (No. 79-C-4373); Offer of Proof Concerning the Testimony of Daniel Mihalovich at para. 12, *EEOC v. Sears* (No. 79-C-4373).

78. Trial Transcript at 14625-29, Testimony of Joan Haworth, *EEOC v. Sears* (No. 79-C-4373). Haworth was analyzing applications that provided a single box marked "sales" for applicants to check, without a breakdown into commission and noncommission sales. The EEOC's analysis incorporated the assumption that female applicants who checked sales and had background and experience in commission sales were interested in commission sales positions. Sears challenged this assumption by putting Haworth on the stand to testify that such women were not in fact interested in commission sales.

79. One stated, "[C]ommission sales is exactly what I was looking for and was the reason I came to Sears and put in an application." Written Testimony of Lura L. Nader at 1, *EEOC v. Sears* (No. 79-C-4373). See also Written Testimony of Alice Howland at 4.

80. Judge Nordberg's opinion discounted these witnesses' testimony on the ground that the

Sears also systematically discounted interests expressed by female applicants in "male" jobs such as auto sales. Haworth, who argued that those applicants were puffing up their interest, guarded against this by "normalizing" the scores of female applicants. Her methodology functioned to ensure that sales applicants who indicated interest in working both in "male" areas such as auto sales and in "female" areas such as the baby department had their "male" interests systematically discounted.⁸¹

Sears' attorneys had help from the trial judge in policing gender stereotypes.⁸² Judge John A. Nordberg, a Reagan appointee, played an active role in shaping the evidence to support his eventual holdings that women lack interest in "male" jobs. Whenever EEOC witnesses made statements about women's commitment to the home and their lack of commitment to wage labor that contradicted gender stereotypes, Nordberg insisted they specify the precise percentage of women

EEOC had not proven that they were discriminated against. *EEOC v. Sears*, 628 F. Supp. 1264, 1318 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). This of course was not the purpose for which these witnesses' testimony was submitted.

81. This arose in Sears' lawyers' analysis of Sears' Applicant Interview Guides (AIG's), in which applicants were asked to rate their interest in selling various categories of items from one to five in terms of interest, experience, and skill. In Judge Nordberg's words, "The scores were normalized to take into account that some applicants might inflate their scores to increase their chances of being hired." 628 F. Supp. at 1322. Normalization is a commonly used statistical technique, but two of EEOC's experts testified they had never seen it used as Dr. Haworth used it.

The normalization procedure only registered the applicant in a category if the applicant gave herself a rating for each of the three dimensions (interest, skill and experience) that was 125% of her average rating for that dimension on all other AIG activities. For example, if an individual rated herself four for each of interest, experience, and skill in home improvement, this rating would be counted only if her average rating for all other activities covered by the AIGs was not greater than 3.2 for each of interest, experience, and skill. This procedure penalized people with varied interests and experience. It was therefore likely to penalize women with interest or experience in nontraditional work unless those women both disclaimed interest in and had never done traditional women's work. Thus women's interest in nontraditional work was systematically discounted. Consequently, a woman who had held a low-paying sales position of the type in which women retail workers are disproportionately concentrated would be likely to have any interest she expressed, or experience she had, in commission sales discounted. Since men are less likely to have experience or interest in (lower-paying) women's work, their interest in higher-paying jobs traditionally held by men was much less likely to be discounted. Compare Judge Nordberg's analysis, 628 F. Supp. at 1322 n.79, with Brief of the Equal Employment Opportunity Commission as Appellant at 41-42, *EEOC v. Sears*, 839 F.2d 302 (7th Cir. 1988).

82. Sears also had help from the EEOC. The Agency's decision not to provide testimony from victims of discrimination made it much easier for Sears to make general arguments on the basis of stereotypes. The EEOC's position is that if it had provided witnesses, the trial judge would have discounted their testimony on the grounds that the witnesses were too few in number or were otherwise unrepresentative of the nationwide class. Brief of the Equal Employment Opportunity Commission as Appellant at 151-53, *EEOC v. Sears*, 839 F.2d 302 (7th Cir. 1988). However, the testimony of live women interested in nontraditional jobs might have made it more awkward for the courts to accept Sears' assertions about women's interests. Maybe not, of course; see *supra* notes 78-79. But the existence of victim testimony so labelled would at the least have required the Seventh Circuit to write its opinion differently. It relied heavily on the lack of testimony from "real" victims. See 839 F.2d at 310-12.

whose interests diverged from those of women in general (*i.e.*, from gender stereotypes). Here's one example from the testimony of historian Alice Kessler-Harris, who countered Rosenberg's testimony by arguing that women generally have taken higher paying jobs when they became available despite the mandates of domesticity.

Could I just interrupt for one second, Dr. Harris, or Kessler-Harris. This is what I have said to others, and if you had sat through all the testimony, you would understand the reason for my saying this. One of the difficulties in analyzing and dealing with the evidence in the case is a tendency of witnesses to use the phrase "men and women" as though it is 100 percent of men or 100 percent of women. I think that the testimony makes it clear that there are a range of personalities, interests, experiences, achievements, and everything in both sexes And what this case in a sense is getting down to, because of the statistical nature of the case, is percentages. It would be very helpful to me during the course of your testimony to try to quantify the percentage or the proportion or possible number that you are dealing with in any particular thing that you say. I [know] it is hard, because you are, in a sense, seeking to generalize. But it makes it very difficult when it is asserted that either women so and so or men so and so, when we all know that it isn't 100 percent correct.⁸³

Judge Nordberg repeated the same point as a constant refrain to the testimony of EEOC witnesses. Women behave like this, they testified. What percentage, Nordberg asked again and again.⁸⁴ When Sears witnesses made generalized statements about women that *confirmed* stereotypes derived from domesticity, Nordberg's concern for quantification evaporated. I found no instance in which Nordberg felt the need for this type of quantification from Sears witnesses.⁸⁵ Nordberg's opinion shows why: he adopted the argument advanced by Sears (through Rosalind Rosenberg) that women who did not fit conventional stereotypes were a marginal group of (uppity?) college women. No statistical evidence supported this assertion.⁸⁶

Nordberg's insistence on quantification in effect required plaintiffs to specify the precise percentage of women interested in nontraditional

83. Trial Transcript at 16501-02, *EEOC v. Sears* (No. 79-C-4373).

84. For example, Nordberg repeated this point to Alice Kessler-Harris six times. Trial Transcript, *passim*, *EEOC v. Sears* (No. 79-C-4373).

85. I have not read the entire 19,000-page transcript. However, I note that Nordberg never pressed Sears' complementary witness Rosalind Rosenberg to attach a percentage to her claims about women, although those claims often were as unqualified as Kessler-Harris', or more so. To Rosenberg, Nordberg stressed the need to qualify her statements by designating the time period to which they applied. Trial Transcript at 10374-76, *EEOC v. Sears* (No. 79-C-4373). That objection was much easier to meet: it is easier for a historian to limit generalized statements to a given century than to specify what precise percentage of women during a given period wanted nontraditional jobs (or otherwise diverged from women's traditional roles).

86. See 628 F. Supp. at 1314-15; Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, para. 23, *EEOC v. Sears* (No. 79-C-4373).

jobs such as commission sales. By not requiring *Sears* to provide equivalent proof of the specific percentage of women who *fit* gender stereotypes, the *Sears* district court opinion in effect establishes a legal presumption that all women fit traditional gender stereotypes. The Seventh Circuit opinion wholeheartedly adopted this approach.⁸⁷

Sears' doctrinal innovation clashes at a fundamental level with the thrust of Title VII. *Sears* allows information about *gender*, about women *as a group*, to be used to establish a legal presumption about individual plaintiffs consolidated into a class. This is inappropriate because Title VII is designed to protect women who do not fit gender stereotypes, who want to work as physicists, or in auto sales. Title VII's underlying goal is to protect women who want nontraditional work. Establishing a legal presumption that every class of female plaintiffs conforms to gender stereotypes frustrates this goal.

Sears is thus a dramatic reversal of existing Title VII law and should be overruled. From a theoretical standpoint, *Sears* shows the power of gender stereotypes to overshadow evidence about actual women. *Sears* also shows how relational feminism's critique of possessive individualism serves to marginalize both women and the critique itself.

Unlike the critique of capitalism from traditional radical discourse,⁸⁸ domesticity's critique does not compel its followers to confront capitalist practice and to change it. Instead, an abiding tenet of domesticity is that women's aversion to capitalist virtues makes them "choose" home and family.⁸⁹ This is an argument that encourages women to "choose" economic marginalization and celebrate that choice as a badge of virtue. This analysis of domesticity as an ideology designed to enlist women in their own oppression will be more fully developed later.⁹⁰ For now the important thing is how *Sears* mobilized domesticity's critique of possessive individualism against women.

One can see how domesticity's compliments add up to its critique: women reject crass competition; they favor a friendly, cooperative, working environment over mere material advancement; they value their commitments to family over career success.⁹¹ *Sears*' argument demonstrates how domesticity's critique of possessive individualism

87. See 839 F.2d at 320-21.

88. I use the term "radical discourse" to refer to radical rhetoric in the Marxist tradition. This includes both classical Marxism and the neo-Marxist critical theorists.

89. See *infra* text accompanying notes 126-33.

90. See *infra* text accompanying notes 134-38.

91. Compare Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, *EEOC v. Sears* (No. 79-C-4373), at paras. 19(c), 20(a) (women reject competitiveness) and para. 19(a) ("Women tend to be more interested than men in the cooperative, social aspects of the work

rests on a claim that women are psychologically unsuited to the economic mainstream. All Sears did was pick this up and use it to argue that women are psychologically unsuited to work in commission sales.

Sears thus illustrates how domesticity's gendered critique of possessive individualism functions to marginalize the women who espouse it. It also shows that domesticity's power derives from its ability to make arguments about women's "choice" vaguely complimentary instead of clearly insulting. When defendants prior to *Sears* tried to mobilize the interest argument, they met with little success because their "interest" arguments so clearly mobilized racist or sexist insults. For example, the assertion in a 1976 race discrimination case that blacks lacked interest in law enforcement evidently smacked too much of a claim that blacks are lazy and shiftless, or inherently not law-abiding.⁹² In another case, the defendant's argument that women did not need the vocational training available to men since women choose unskilled jobs anyway also struck a jarring note.⁹³ In both cases, the interest argument evidently struck the courts as a blatant attempt to use against minorities the insulting stereotypes to which they traditionally have been subjected. *Sears*' lawyers succeeded because they used against women not the insults but the compliments of domesticity. Once the interest argument was linked with women's *virtues*, the trial judge and the conservative Seventh Circuit found it easier to frame complimentary holdings asserting that women choose their relative poverty, while framing their argument as a paean to female virtue.⁹⁴

If *Sears* contains some disturbing messages for relational feminists, it also contains a comforting one: that by giving up domesticity's critique of possessive individualism, they are abandoning a singularly ineffective critique. A key source of the attraction of "women's voice" for feminists and other progressive thinkers is that, in a society where radicals have had trouble being taken seriously, relational feminism offers a critique of capitalism that avoids the perceived stridency of traditional radical discourse. It is Marxism you can take home to mother.⁹⁵ But, as *Sears* shows, this strength is also a weakness, for

situation.") with para. 10 ("Even as they have entered the labor force in increasing numbers, women have retained their historic commitment to the home.").

92. *Castro v. Beecher*, 334 F. Supp. 930, 936 (D. Mass. 1971).

93. *Glover v. Johnson*, 478 F. Supp. 1075, 1086-88 (E.D. Mich. 1979), *affd. sub nom. Cornish v. Johnson*, 774 F.2d 1161 (6th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

94. See *EEOC v. Sears*, 628 F. Supp. 1264, 1307-08 (N.D. Ill. 1986); 839 F.2d 302, 320-21 (7th Cir. 1988).

95. This phrase was first applied to Antonio Gramsci. See Romano, *But Was He a Marxist?* (Book Review), *VILLAGE VOICE*, Mar. 29, 1983, at 41, *quoted in* Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AM. HIST. REV. 567 (1985).

what domesticity offers is a singularly "domesticated" critique that accepts the notion that anyone who rejects the values of contemporary capitalism freely chooses to eschew the spoils of capitalist endeavor. As traditional radical discourse makes clear, the whole point of critiquing capitalism is to challenge the way in which wealth is created and distributed. Domesticity's critique is designed to evade the central issue of whether society should be transformed.

D. Conclusion

Lebsock offered a balanced assessment of relational feminism when she noted that the "emphasis on gender differences has great promise and great strategic risks. The risks derive from the difficulty we have in thinking in genuinely egalitarian terms The promise lies farther off."⁹⁶ With *Sears*, the risks associated with relational feminism have been played out. Moreover, I have argued that the promise of relational feminism, its critique of possessive individualism, is fundamentally flawed. Plenty of less dangerous, nongendered critiques exist to help progressives in their search for words against the resurgence of classical economic liberalism: The ongoing fascination with republicanism offers a possible alternative.⁹⁷ Neither this approach, nor traditional radical discourse — nor, for that matter, standard New Deal rhetoric — holds the pitfalls of relational feminism.⁹⁸ Instead of rehabilitating inherently loaded stereotypes, contemporary feminists

96. S. LEB SOCK, *supra* note 34, at 144.

97. See, e.g., Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 3 (1986); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1983); Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767. For critiques of possessive individualism not framed in gendered terms, see R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 275-96 (1985); Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985); Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567 (1983); Lynd, *Communal Rights*, 62 TEXAS L. REV. 1417 (1984); Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985); Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984). I find it particularly disturbing when feminists cite ungended critiques and characterize them as "feminine." See, e.g., Sherry, *supra*, at 543-44. Indeed, Hendrik Hartog has argued that, to the extent republicanism is gendered, it is patriarchal. See Hartog, remarks in a round table discussion on *The Constitution, Republicanism, and Women in the New Nation*, at the Seventeenth Annual Meeting of the American Society for Legal History, Oct. 23-24, 1987. The only overlap I can see between Sherry's description of republicanism and that of the "feminine voice" is that both constitute critiques of liberal individualism. This overlap does not make republicanism "feminine." See also Schneider, *supra* note 17, at 612-13 (discussing parallels between feminist theory and Sparer's nongendered critiques of capitalism).

98. See Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS: J. WOMEN CULTURE & SOC. 644 (1987).

should follow through domesticity's insights into the gendered structure of American capitalism to their logical conclusion. This following section begins that process.

II. CHALLENGING THE GENDERED STRUCTURE OF WAGE LABOR

The challenge to "male norms" offered by the feminism of difference is comprised of two quite different elements. The first is the critique of "male" behavior and values, which in essence is the critique of possessive individualism. A second element is the critique of men's traditional life patterns. Like the first, this second critique has traditionally been linked with domesticity, but it need not be. In this section, I present an analysis that challenges the desirability of men's traditional life patterns without linking the critique to domestic ideology.

A rejection of men's traditional life patterns entails a fundamental challenge to the structure of wage labor. In articulating such a challenge, I begin from Catharine MacKinnon's analysis of gender as a system of power relations.⁹⁹ While I disagree with many of MacKinnon's conclusions,¹⁰⁰ her initial premise is a powerful one: that inequalities of power are the core feature of the gender system as we know it. MacKinnon and her followers have explored the implications of this insight primarily in the context of sexuality. Here I turn to a more conventional topic, and analyze the Western wage labor system as a system of power relations that leaves women economically and socially vulnerable.

Western wage labor is premised on an ideal worker with no child care responsibilities.¹⁰¹ In this system men and women workers are

99. See, e.g., C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN — A CASE OF SEX DISCRIMINATION* 92, 101-29, 215-21 (1979) [hereinafter *SEXUAL HARASSMENT*]; C. MACKINNON, *FEMINISM UNMODIFIED* 32-42 (1987) [hereinafter *FEMINISM UNMODIFIED*].

100. See *infra* text accompanying notes 175-80.

101. I would like to thank Ann Freeman for insights and encouragement in developing this argument, of which she has a somewhat different version. Mary Joe Frug has articulated the core insight that Western wage labor assumes a worker with no child care responsibilities in her seminal study, Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979).

Note that I am not arguing that I have provided a full explanation of gender dynamics. Other commentators have analyzed other parts of the gender system, notably Catharine MacKinnon in her work on the social construction of sexuality. See C. MACKINNON, *supra* note 41, at 85-92.

Scholars outside the law, notably Zillah Eisenstein, also have developed analyses that overlap with the one presented here. See Z. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* (1981); Eisenstein, *The Sexual Politics of the New Right: Understanding the "Crisis of Liberalism" for the 1980s*, 7 SIGNS: J. WOMEN CULTURE & SOC'Y. 567 (1982). Although Eisenstein's analysis is insightful, I question her assumption that a change in the structure of wage labor necessarily entails a wholesale abandonment of liberalism and capitalism. Wage labor could be restructured to eliminate the conflict between wage labor and reproduction while leav-

allocated very different roles. Men are raised to believe they have the right and the responsibility to perform as ideal workers.¹⁰² Husbands as a group therefore do far less child care, and earn far more, than their wives. Women are raised with complementary assumptions. They generally feel that they are entitled to the pleasure of spending time with their children while they are small. Moreover, even upon their return to work, the near-universal tendency is to assume that women's work commitment must be defined to accommodate continuing child-care responsibilities.¹⁰³

This gender system results in the impoverishment of women, since it leads mothers systematically to "choose" against performing as ideal workers in order to ensure that their children receive high-quality care. The phenomena that comprise the gender system today are often noted, but the way the system functions as a coherent whole remains largely hidden.¹⁰⁴ The following analysis will show how the impoverishment of women upon divorce, the feminization of poverty, and to some extent the wage gap between men and women, are all parts of a dynamic that leads to the systematic impoverishment of women.

Before the industrial revolution, both men and women engaged in economic production, and though women were viewed as inferior, a certain fluidity existed between men's and women's roles.¹⁰⁵ This situation changed with the shift from task-oriented to time-disciplined labor in the late eighteenth century. By the nineteenth century, men's and women's roles were sharply differentiated. Under the new gender system, married women ordinarily experienced utter financial depend-

ing intact the basic premise of decentralized production fueled by "private" capital. Moreover, while I recognize that one approach to redefining the ideal worker is to redefine liberalism's demarcation between the public and private spheres by making child care a state responsibility, in my view this approach fails to address the fact that an 8- to 10-hour workday often does not leave enough time for effective parenting.

102. I do not mean that all men choose to be ideal workers, just that men as a group generally feel it is their right to be ideal workers if they so choose. Individual variation remains important: some men do decide to scale back their career aspirations in order to spend more time with their families.

103. Although in the text I focus on child care, women also shoulder a disproportionate share of the housework. See Burros, *Women: Out of the House But Not out of the Kitchen*, N.Y. Times, Feb. 24, 1988, at A1, col. 1.

104. What I describe here are only the most recent developments of a long-standing pattern. See Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, 6 SIGNS: J. WOMEN CULTURE & SOC. 366, 371-73 (1981).

105. See L. ULRICH, *supra* note 20, at 14-50. Actually, as Ulrich explains, while women could perform male activities so long as they were acting under the supervision and authority of their husbands, men did not similarly cross over and perform women's activities. This is the classic pattern, today best illustrated by patterns of dress: it is easier to persuade the dominant group to share its privileges with the subservient group than it is to persuade the dominant group to threaten its status by adopting behaviors associated with subservience. In short, real women may wear tuxedos, but real men do not wear high heels.

ence on their husbands, though a divorceless society protected wives from destitution so long as they stayed with their husbands and — perhaps more to the point — their husbands stayed with them.

This gendered division of labor had a certain logic during the colonial era, when the average white woman got pregnant once every 24 months, and had an average of more than seven live births.¹⁰⁶ In addition, childbirth was hazardous and frequently incapacitated women for substantial periods.¹⁰⁷ Marriage made biological reproduction a full-time job for most married women, even assuming that the household did not produce what it consumed, which many households did.¹⁰⁸ Under these conditions the blanket assumption that married women were not suitable for life-long careers of time-disciplined labor may not have been far from the truth.

Since colonial times, childbirth has become safer and birth rates have fallen precipitously,¹⁰⁹ yet the structure of wage labor remains unchanged. Meanwhile, divorce rates have risen at an astonishing rate. In 1870, 8 percent of marriages ended in divorce; today 48 percent of all marriages do, and half of all American children will experience family disruption by age eighteen.¹¹⁰ This has created a new dynamic within the traditional gender system that makes the system more repressive than at any other time in its history.¹¹¹ While women are keeping their side of the gender bargain, by “choosing” to marginalize themselves economically in order to allow their husbands to perform as ideal workers, many men no longer are honoring their commitment to support their mates and children. Divorced men in

106. The first figure is for women in New England. See *New England: The Little Commonwealth*, in *THE LEGACIES BOOK: A COMPANION VOLUME TO THE AUDIOCOURSE LEGACIES: A HISTORY OF WOMEN AND THE FAMILY IN AMERICA, 1607-1870*, at 32 (E. Pleck & E. Rothman eds. 1987). The second figure is for all American white women. See J. LEAVITT, *BROUGHT TO BED* 14 (1986); Smith, *supra* note 52, at 226. Leavitt points out that the standard statistic refers to live births, which implies a substantially greater number of pregnancies to account for stillbirths and miscarriages.

107. See J. LEAVITT, *supra* note 106, at 13-35.

108. See Gordon & Buhle, *Sex and Class in Colonial and Nineteenth-Century America*, in *LIBERATING WOMEN'S HISTORY* 279-84 (B. Carroll ed. 1976). The development of a market economy worked to disrupt household production by the end of the eighteenth century. *Id.* at 283. See also H.R. HAYS, *THE DANGEROUS SEX* 270 (2d ed. 1972).

109. See Smith, *supra* note 52, at 226-27.

110. L. WEITZMAN, *THE DIVORCE REVOLUTION* 215 (1985); U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* (108th ed. Supp. 1988); U.S. DEPT. OF COMMERCE AND LABOR, BUREAU OF THE CENSUS, *MARRIAGE AND DIVORCE: 1867-1906*, at 13 (1909).

111. See T. ARENDELL, *MOTHERS AND DIVORCE* 150-60 (1986) (comprehensive look at the gender bias in divorce). It should be emphasized again that the gender system has always served to transfer wealth from women to men: the developments discussed here are only the most recent. See Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, in *WOMEN AND REVOLUTION* 15-19 (L. Sargent ed. 1981).

massive numbers pay little or no alimony or child support.¹¹² Under these conditions, women's choice to eschew "ideal worker" status for the sake of their children often leads to impoverishment of their children as well as themselves.¹¹³

The impoverishment of previously married women parallels the pattern among single mothers. With the breakdown of sexual taboos, increasing numbers of mothers are never married to the fathers of their children. These unwed fathers tend to play even less of a role in financial support of their children than do divorced fathers.¹¹⁴

The wage gap, a third crucial element in the feminization of poverty, also appears to stem in part from the gendered distribution of wage labor and child-care responsibility.¹¹⁵ Economists employing "human capital" theory have argued that the wage gap is attributable not to discrimination but to women's choices.¹¹⁶ One study has estimated that roughly half of the wage gap between men and women is attributable to factors that, upon inspection, relate to women's child-care responsibilities. These factors include differences in work experience, work continuity, and ability to work full time and during ill-

112. L. WEITZMAN, *supra* note 110, at 143-83, 262-322 (1985); Pearce, *Welfare Is Not for Women: Toward a Model of Advocacy To Meet the Needs of Women in Poverty*, 19 CLEARINGHOUSE REV. 412, 413-14 (1985).

113. The impoverishment of middle- and working-class women upon divorce is a tragedy with striking potential for changing cultural norms, as women come to realize that they need to be empowered to perform as ideal workers to protect not only their own futures, but those of their children. "Legislation can only go so far," said New York family court Judge Emily Jane Goodman. "No divorce reform will be successful until women have economic independence. Women need to concentrate on being financially independent before, during and after marriage." Blair, *Women Who Divorce: Are They Getting a Fair Deal?*, WOMAN'S DAY, May 27, 1986, at 36, 45.

114. Unwed fathers are almost as likely to pay formal child-support awards, but the annual awards are much lower in amount (\$1147 compared to \$2538). Moreover, many fewer never-married mothers than divorced mothers are granted child-support awards (19% compared to 82%). U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY, ADVANCED DATA FROM MARCH-APRIL 1986, CURRENT POP. SURVEYS (Series P-23, No. 152) (Aug. 1987). Note that experts caution that formal child-support awards are not a good indicator of responsibility among fathers, since they do not count informal gifts of money and non-monetary help, such as child care. Conversation with Gina Adams, Children's Defense Fund, Aug. 25, 1988; CHILDREN'S DEFENSE FUND, ADOLESCENT AND YOUNG ADULT FATHERS, May 1988.

115. See WOMEN AND THE WORKPLACE: THE IMPLICATIONS OF OCCUPATIONAL SEGREGATION (M. Blaxall & B. Reagan eds. 1976); SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES (B. Reskin ed. 1984); Beller, *Occupational Segregation and the Earnings Gap*, in COMM. ON CIVIL RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80's, at 23-33 (1984); Burns, *Apologia for the Status Quo* (Book Review), 74 GEO. L.J. 1791, 1798 (1986); Frug, *supra* note 101, at 57-61; Kingston, *Women in the Law Say Path is Limited by Mommy-Track*, N.Y. Times, Aug. 7, 1988, at A1, col. 5 (professional jobs "off the fast track").

116. See C. LLOYD & B. NIEMI, THE ECONOMICS OF SEX DIFFERENTIALS 88-150 (1979); Polachek, *Discontinuous Labor Force Participation and Its Effect on Women's Market Earnings in SEX, DISCRIMINATION, AND THE DIVISION OF LABOR* 90 (C. Lloyd ed. 1975); see also B. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 25 (1986) (criticizing these theories).

nesses of the worker or other family members.¹¹⁷ (Note that even were we to agree that women "choose" disproportionate child-care responsibilities, human capital theorists themselves implicitly acknowledge that such choices cannot account for all of the wage gap. Their own estimates leave 55 percent of the wage gap unexplained. This percentage may reflect discrimination.¹¹⁸)

In fact, both discrimination against women and women's "choices" must be seen as elements of an integrated system of power relations that systematically disadvantages women. Women's choices show the system's success in persuading women to buy into their own economic marginalization. Openly discriminatory treatment based on the notion that "women should stay at home" shows how gender ideology serves to police the gender system by eliminating options that would loosen the grip of gender roles. In sum, women's choices show how women perpetuate the gender system themselves; discrimination shows how others join them in policing the gender system.

The impoverishment of women that results from the current gender system has been well documented.¹¹⁹ Lenore Weitzman has shown that women experience a 73 percent decline in their standard of living in the year after divorce; men experience a concomitant 42 percent rise in living standards.¹²⁰ Statistics on the feminization of poverty also are well known. Three out of every five people with incomes below the poverty line are women.¹²¹ Three-fourths of all black families below the poverty line are headed by women.¹²² Two out of every three poor elderly people are women.¹²³ Almost one in three female-headed households is poor; only about one in eighteen male-headed households is.¹²⁴ The average income of female-headed families is less than half that of male-headed families. Moreover, families composed

117. See C. LLOYD & B. NIEMI, *supra* note 116, at 79-80.

118. See *id.* at 204-05. See also R. TSUCHIGANE & N. DODGE, *ECONOMIC DISCRIMINATION AGAINST WOMEN IN THE UNITED STATES* 35-45 (1974).

119. See L. WEITZMAN, *supra* note 110, at 337-56; see also R. EISLER, *DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN* 20-54 (1977); Levin, *Virtue Does Not Have Its Reward for Women in California*, 61 *WOMEN LAW. J.* 55, 57 (1975); Prager, *Shifting Perspectives on Marital Property Law*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 111, 123 (B. Thorne & M. Yablom eds. 1982). Betty Friedan has played a role in popularizing the issue. See, e.g., B. FRIEDAN, *IT CHANGED MY LIFE* 325-26 (1976); Friedan, *supra* note 8, at 98.

120. L. WEITZMAN, *supra* note 110, at 337-56. See also Burtless, *Comments on Income for the Single Parent: Child Support, Work, and Welfare*, in *GENDER IN THE WORKPLACE* 263 (C. Brown & J. Pechman eds. 1987); Blair, *supra* note 113, at 36.

121. Eisenstein, *The Sexual Politics of the New Right: Understanding the "Crisis of Liberalism" for the 1980s*, reprinted in *FEMINIST THEORY: A CRITIQUE OF IDEOLOGY* 77 (1981).

122. Pearce, *supra* note 112, at 413.

123. Eisenstein, *supra* note 121, at 91.

124. Figures for households not headed by females are from the National Advisory Council

of women and children are ten times more likely to stay poor than are families where a male is present.¹²⁵

The feminization of poverty reflects the way the gendered labor system invented at the time of the Industrial Revolution has adapted to modern conditions. In a world where many more women than ever before are raising children without significant financial assistance from men, the gender system has taken on a more repressive dynamic than at any time since its invention.

Why is this so difficult to see? In large part because of the ideology that women's disadvantaged position results from choices made by women themselves. Alexis de Tocqueville offered an early version of this argument over a century ago.

In America, a woman loses her independence forever in the bonds of matrimony. While there is less constraint on girls there than anywhere else, a wife submits to stricter obligations. For the former, her father's house is a home of freedom and pleasure; for the latter, her husband's is almost a cloister.

....

... [Yet, the American woman] herself has freely accepted the yoke. She suffers her new state bravely, for she has chosen it.¹²⁶

The modern form of this argument is the contemporary celebration of women who either subordinate their careers or abandon them altogether because they "know their own priorities." "[A] woman shouldn't have to apologize for her priorities," said Betty Friedan in a recent interview on "sequencing," *i.e.*, women dropping out of professional life for the period when their children are young.¹²⁷ News articles on "sequencing" seem invariably to point to women such as Jeane J. Kirkpatrick, Sandra Day O'Connor, and D.C. Circuit Chief Judge Patricia Wald, each of whom took from five to fifteen years off to stay home with young children.¹²⁸ Only occasionally do these articles note that such women are the exception.¹²⁹ I suspect most women would take years off their careers if they could be guaranteed that upon their return they could become an ambassador to the United Nations, a

in Economic Opportunity study, which reported that 39% of all female-headed households live under the poverty line. See Blair, *supra* note 113, at 40.

125. Pearce, *supra* note 112, at 413.

126. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 568 (J. Mayer & M. Lerner eds. 1966).

127. See Rimer, *supra* note 7.

128. See, e.g., Fierst, *supra* note 7, at 62-63; Rimer, *supra* note 7.

129. See, e.g., Rimer, *supra* note 7. See also Torry, *Female Lawyers Face Persistent Bias, ABA Told*, Wash. Post, Aug. 9, 1988, at A1, A4 ("women are not increasing their representation among partnerships, judgeships and tenured law faculty positions in nearly the percentages their numbers and class rank would indicate" in part due to the fact "they are forced to sacrifice career advancement . . . to have children").

Supreme Court Justice, or a D.C. Circuit Court judge — just as many men (and women) would take time off for a stint as an artist, a carpenter, or a ski bum if they could be offered the same assurance. But most “sequencers” are not so lucky. In the words of one company executive, “From a total career standpoint, anyone has to realize the realities of a big hiatus in their career — that it is certainly going to slow it down.”¹³⁰ (And this executive worked for a company that is actively seeking to hire reentering women — what do the executives of companies say who refuse to hire such women?)

There is growing evidence that a career hiatus, at least in some professions, does not merely slow women down, but places them permanently in a second-class, relatively low-paid “mommy track.”¹³¹ This development has received particular attention in the law. One recent article notes the “frightening possibility” that law firms will evolve into institutions “top-heavy with men and childless women, supported by a pink-collar ghetto of mommy-lawyers,” often with permanent associate status.¹³²

The professional who removes herself from the fast track is only part of the syndrome by which women systematically “choose” economic marginalization. Probably the more important aspect of the phenomenon is the tendency among women to select jobs that will allow them to fulfill their “family responsibilities,” even if such jobs pay less and offer less opportunity for advancement.¹³³

These two phenomena are an integral part of the economic marginalization of women. Decoded, the current talk about women’s priorities is a translation into new language of domesticity’s old argument that women’s values lead them to make different choices. The persistence of this classic argument makes it imperative for feminists to analyze why the argument has abiding persuasiveness. The approach most useful to an analysis of women’s “choice” is Antonio Gramsci’s concept of cultural hegemony.¹³⁴ Gramsci painted a com-

130. Rimer, *supra* note 7. See also sources cited *supra* notes 115-18.

131. See Kingston, *supra* note 115; Hickey, *supra* note 7, at 59.

132. Hickey, *supra* note 7, at 59.

133. See Fuchs, *Sex Differences in Economic Well-Being*, SCIENCE, Apr. 26, 1986, at 459, 462-63; Frug, *supra* note 101, at 55-59; K. GERSON, *HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD* 92-122 (1985); P. BLUMSTEIN & P. SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 325-26 (1983); S. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN’S LIBERATION IN AMERICA* 18-47 (1986); INSTITUTE FOR WOMEN’S POLICY RESEARCH, *UNNECESSARY LOSSES* 10 (executive summary) (1988) (new mothers’ annual earnings and hours of employment are lower than those of women without babies).

134. Good introductions to Gramsci are A. GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Q. Hoare & G. Smith eds. & trans. 1971); W. ADAMSON, *HEGEMONY AND REVOLUTION: A STUDY OF ANTONIO GRAMSCI’S POLITICAL AND CULTURAL THEORY* (1980); J. CAMMETT, *ANTONIO GRAMSCI AND THE ORIGINS OF ITALIAN COMMUNISM* (1967); A. DA-

plex picture of how the dominant culture rules with the consent of the governed by shaping a "hegemony" of values, norms, perceptions, and beliefs that "helps mark the boundaries of permissible discourse, discourages the clarification of social alternatives, and makes it difficult for the dispossessed to locate the source of their unease, let alone remedy it."¹³⁵

Gramsci's thought suggests that feminists can approach women's culture as a system of cultural hegemony. Marxist feminists have long argued that domesticity is a capitalist tool to privatize the costs of workers at the expense of women for the benefit of the employers.¹³⁶ Gramsci's analysis offers needed subtlety by focusing on the complexities surrounding women's consent. For Gramsci consent is a complex state fraught with ambiguities, a "'contradictory consciousness' mixing approbation and apathy, resistance and resignation."¹³⁷

Gramsci's analysis of consent suggests that feminists must come to terms with the ways in which women's culture has served to enlist women's support in perpetuating existing power relations. As historian T.J. Jackson Lears has expressed it:

The idea that less powerful folk may be unwitting accomplices in the maintenance of existing inequalities runs counter to much of the social and cultural historiography of the last fifteen years, which has stressed the autonomy and vitality of subordinate cultures. Discovering nearly inexhaustible resources for resistance to domination, many social historians have been reluctant to acknowledge the possibility that their subjects may have been muddled by assimilation to the dominant culture — perhaps even to the point of believing and behaving against their own best interests.¹³⁸

Women's historians and other feminists have illustrated this reluctance. In their effort to do justice to the dignity of women, they resoundingly rejected the image of women as victims, and instead have celebrated women's "nearly inexhaustible resources for resistance."¹³⁹ Now that this refusal to see women as victims has been transposed into a blame-the-victim argument through the rhetoric of choice, there is an acute need for a more balanced view of women's culture. A bal-

VIDSON, ANTONIO GRAMSCI: TOWARDS AN INTELLECTUAL BIOGRAPHY (1977); J. FEMIA, GRAMSCI'S POLITICAL THOUGHT (1981); T. NEMETH, GRAMSCI'S PHILOSOPHY: A CRITICAL STUDY (1980).

135. Lears, *supra* note 95, at 569-70.

136. This has long been noted by Marxists. See, e.g., Hartmann, *supra* note 111, at 28; see also Harding, *What Is the Real Material Base of Patriarchy and Capital?*, in *WOMEN AND REVOLUTION* 130 (L. Sargent ed. 1981).

137. Lears, *supra* note 95, at 570.

138. *Id.* at 573 (footnote omitted).

139. *Id.*

anced perspective could be achieved by synthesizing two distinct periods of women's history that thus far have remained remarkably resistant to such synthesis.

Before the mid-1970s, many women's historians concentrated on documenting how domesticity cramped women's lives.¹⁴⁰ This early focus on how domesticity oppressed women was replaced after 1975 by a revisionist movement initiated by Carroll Smith-Rosenberg's influential article entitled *The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America*.¹⁴¹ Smith-Rosenberg's article began a celebration of nineteenth-century women's culture, as historians explored the close emotional ties as well as the empowering aspects of women's separate sphere.¹⁴² This literature, which developed simultaneously with Gilligan's feminism and echoed its celebration of women's different voice, takes on new meaning when it is combined with the earlier literature documenting the oppressive aspects of nineteenth-century women's culture. To put it bluntly, women's rich emotional relationships in their disempowered sphere and the seductive compliments of domesticity — in particular, the notion that women were more moral than men¹⁴³ — encouraged women to "choose" their own repression. This analysis need not deny the positive elements of women's culture. But it does demonstrate the need to assess how those positive elements sought to enlist women in their own oppression, and the extent to which that effort has been successful. *Sears* showed how traditionalist judges can use women's culture against women. The more troubling question is the extent to which women use it against themselves, as they do every time a woman "chooses" to subordinate her career "for the good of the family" and congratulates herself on that choice as a mature assessment of her own "priorities."¹⁴⁴

140. See e.g., Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151, 152 (1966). A sampling of other representative works: Faragher & Stansell, *Women and Their Families on the Overland Trail to California and Oregon, 1842-1867*, 2 FEM. STUD. 150 (1975); Smith-Rosenberg, *The Hysterical Woman: Sex Roles and Role Conflict in 19th-Century America*, 39 SOC. RES. 652 (1972); Wood, *The "Scribbling Women" and Fanny Fern: Why Women Wrote*, 23 AM. Q. 3 (1971). Welter and other contemporary writers of women's history were directly influenced by Betty Friedan's *The Feminist Mystique*. See Kerber, *supra* note 2, at 11. Kerber offers an astute reassessment of women's history designed to move beyond the stages I discuss here.

141. Smith-Rosenberg, *The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America*, reprinted in A HERITAGE OF HER OWN, *supra* note 37, at 311.

142. See Kerber, *supra* note 2, at 14-15.

143. It should be noted that the notion that women are more moral than men offered women real power in the nineteenth century, something I would argue it does not do today. See Ginzberg, "Moral Suasion Is Moral Balderdash": *Women, Politics, and Social Activism in the 1850s*, 73 J. AM. HIST. 601 (1986).

144. I do not mean to imply that all women who take primary child care responsibility at the expense of their ability to be ideal workers do so because they are persuaded by domesticity's

Feminists need to arm women to resist the argument that women's economic marginalization is the product of their own choice. Challenging this argument should be easy, since, in fact, in our deeply gendered system men and women face very different choices indeed. Whereas women, in order to be ideal workers, have to choose not to fulfill their "family responsibilities," men do not.¹⁴⁵ The question women ask themselves is this: Should I make professional sacrifices for the good of my children? In order for the wife's "choice" to be equivalent to her husband's, she would first have to be in a position to ask herself whether or not she would choose to be an ideal worker if her husband would choose to stay home with the children. Second, she would have to pose the question in a context where powerful social norms told her he was peculiarly suited to raising children. When we speak of women's "choices" to subordinate their careers, we are so blinded by gender prescriptions that we can forget that the husband's decision to be an ideal worker rests upon the assumption that his wife will choose not to be in order to allow him that privilege. This is true whether the wife eschews a career altogether or whether (in the modern pattern) she merely subordinates her career to child-care responsibilities.¹⁴⁶ The point is that the husband is doing neither.¹⁴⁷ Women know that if *they* do not sacrifice *no one* will, whereas men assume that if *they* do not, *women* will.

Thus women do not enjoy the same choices as men. But the underlying point is a deeper one: that society is structured so that every-

reassurance that their choice places them on a higher moral plane. Many no doubt settle for part-time work or make other trade-offs with the sense that they are making the best of a bad bargain through a temporary expedient not desirable but inevitable under the circumstances. Yet my sense is that the societal message that women are inherently more nurturing and self-sacrificing, and less competitive and ambitious, often plays a role in helping persuade women that what is inevitable is also "natural" and desirable.

145. This is the case primarily because, despite the entry of large numbers of mothers into the workplace, most fathers have not taken on significantly more home responsibilities. Thus their wives are left trying to perform as ideal workers *and* to provide the support services their husbands require in order to perform as ideal workers. See C. TAEUBER & V. VALDISERA, WOMEN IN THE AMERICAN ECONOMY 7-8 (U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series p-23, No. 146, 1986). As many news articles testify, this is impossible. See, e.g., Hickey, *supra* note 7, at 40-45; Salholz, *supra* note 8.

146. In a recent Gallup poll, 28% of working and 57% of nonworking mothers said they had quit work since having children; 43% of working and 37% of nonworking mothers said they had changed jobs or hours to spend more time with family; 35% of working and 45% of nonworking mothers said they had cut back on career goals. Kantrowitz, Witherspoon, Burgower, Weathers & Huck, *A Mother's Choice*, NEWSWEEK, Mar. 31, 1986, at 46, 51.

147. The power of gender is such that even where the husband's job has the flexibility to accommodate substantial child-care responsibilities, whereas the wife's job does not, the wife often ends up making professional sacrifices to shoulder a disproportionate burden of the child care. For example, when the husband is an academic and the wife works in a law firm, the wife nonetheless often jeopardizes her chances for partnership by working part-time in order to take primary child-care responsibility. See Kingston, *supra* note 115, at 1.

one, regardless of sex, is limited to two unacceptable choices—men's traditional life patterns or economic marginality. Under the current structure of wage labor, people are limited to being ideal workers, which leaves them with inadequate time to devote to parenting, and being primary parents condemned to relative poverty (if they are single parents) or economic vulnerability (if they are currently married to an ideal worker). Wage labor does not have to be structured in this way.

The increasing onerousness of the gender system makes a challenge to the structure of wage labor a priority of the highest order. Moreover, a historic opportunity exists for a challenge: the current revolution in wage labor itself.

This revolution is not that women work; women have always worked.¹⁴⁸ The change is that the majority of *mothers* now engage in wage labor.¹⁴⁹ In 1890, only 2.5 percent of married white women did so,¹⁵⁰ but 59 percent of married women do today, including 51 percent of those with children under three, and 54 percent of those with children under six.¹⁵¹ Not only have married women gone out to work, but the social taboos against such work, a crucial policing mechanism of domestic ideology, also are disappearing.¹⁵² The shift in the traditional assumption that mothers will not work outside the home is encapsulated in the recent welfare reforms.¹⁵³

148. See A. KESSLER-HARRIS, *WOMEN HAVE ALWAYS WORKED* (1981); A. KESSLER-HARRIS, *OUT TO WORK* (1982). Kessler-Harris' title illustrates the difficulty of trying to be consistent about not referring to wage labor as "work," a usage that implies that women's traditional activities, from bearing children to housework, are leisure.

149. *Working Mother Is Now Norm, Study Shows*, N.Y. Times, June 16, 1988, at A19.

150. Smith, *supra* note 52, at 225. Married black women have always worked outside the home in greater numbers. See J. JONES, *LABOR OF LOVE, LABOR OF SORROW* 6-8 (1985). Moreover, the figure for white women has been challenged, see, e.g., Bose, *Devaluing Women's Work: The Undercount of Women's Employment in 1900 and 1980*, in *HIDDEN ASPECTS OF WOMEN'S WORK* 95 (Women and Work Research Group ed. 1987), as have the presumptions that generate it, see Turbin, *Beyond Conventional Wisdom: Women's Wage Work, Household Economic Contribution, and Labor Activism in a Mid-Nineteenth Century Working-Class Community*, in *TO TOIL THE LIVELONG DAY*, *supra* note 20, at 47, 54-56.

151. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 383 (1987). The equivalent figures for 1970 were 40%, 26%, and 31%. B. BERGMANN, *supra* note 116, at 25. Women's labor-force participation in their prime child-raising years (ages 25 to 34) increased from 34.4% to 63.8% between 1954 and 1979. "Between 1950 and 1978, the labor participation rates of mothers with children under six more than tripled, rising from 14 percent to 44 percent." Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1254 (1983). The percentage of married women with children under one who worked outside the home more than doubled between 1970 and 1985. See Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 18 n.66 (1987).

152. B. BERGMANN, *supra* note 116, at 3-4; P. BLUMSTEIN & P. SCHWARTZ, *supra* note 133, at 117-27 (suggesting ambivalence on the issue).

153. See Stevens, *The Welfare Consensus*, N.Y. Times, June 22, 1988, at 4, col. 5.

This massive shift in the gendered distribution of wage labor has produced intense pressures to challenge the assumption that the ideal worker has no child care responsibilities. But this pressure is being evaded by a cultural decision to resolve the conflicts between home and work where they have always been resolved: on the backs of women. In the nineteenth century, married women "chose" total economic dependence in order to fulfill family responsibilities.¹⁵⁴ Today, many women with children continue to make choices that marginalize them economically in order to fulfill those same responsibilities, through part-time work, "sequencing," the "mommy track" or "women's work."¹⁵⁵ In each case, the career patterns that accommodate women's child-care responsibilities often are ones that hurt women's earning potential.

Day care, widely assumed to be the key to incorporating mothers into the labor force,¹⁵⁶ is part of the emerging gender system that reinforces women's traditional condemnation to the margins of economic life, for even mothers with day care cannot truly perform as ideal workers. The ideal worker is one who can work a minimum of 40 hours a week and has no career interruptions (such as time out for childbirth, infant care, or care of the sick)¹⁵⁷ and who can do the things required for "normal" career advancement — which frequently include the ability to work overtime and the willingness to travel and (for white-collar jobs) to be transferred to a different city. Employers are taught they can expect this, but mothers cannot fulfill this career profile even with most types of day care — the single exception may be

154. Professions often enforced women's "choice" with formal rules that required married women to discontinue work. See, e.g., M. ROSSITER, *WOMEN SCIENTISTS IN AMERICA* 15-16 (1982) (A promising female physics professor was forced to resign by Barnard in 1906, upon becoming engaged. Her career ended, although her engagement did not ultimately result in marriage.).

155. See H. KAHNE, *RECONCEIVING PART-TIME WORK* 24-60 (1985); S. SHARPE, *DOUBLE IDENTITY: THE LIVES OF WORKING MOTHERS* 54-63 (1984); Kingston, *supra* note 115, at 1; Rimer, *supra* note 7; Hickey, *supra* note 7, at 59. See also sources cited *supra* note 133. The ten leading occupations of women are ones in which it is relatively easy for workers to leave and reenter. See Marshall & Paulin, *Employment and Earnings of Women: Historical Perspective*, in *WORKING WOMEN: PAST, PRESENT, FUTURE* 10, 24 (1987).

156. See, e.g., Rossi, *Equality Between the Sexes: An Immodest Proposal*, 93 *DAEDALUS* 607, 630 (1964); R. SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* 131 (1980). Rossi has changed her view, and has turned to sociobiology to support her new argument that women are "naturally" more suited to "mothering." Rossi, *A Biosocial Perspective on Parenting*, *DAEDALUS*, Spring 1977, at 1, 4-5; Rossi, *Gender and Parenthood*, 49 *AM. SOC. REV.* 1, 9 (1984).

I do not mean to sound negative about day care, which is an inevitable (and probably desirable) part of a total solution. My only point is that day care by itself is a solution that reinforces the marginalization of women.

157. See Taub, *From Parental Leaves to Nurturing Leaves*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 381-84 (1984-85).

the mother with a full-time housekeeper, a solution available only to the relatively rich.¹⁵⁸

The child-care options available to the great bulk of workers often require someone to take time from work when the child or the caretaker is sick or for other appointments that must take place during business hours.¹⁵⁹ Moreover, many day care centers and many family-care situations offer sharply limited hours that do not accommodate many employers' requirements for overtime work.¹⁶⁰ So long as mothers systematically take up the slack, the traditional gender system will not change: mothers will remain at the margins of economic life. And 85 percent of all working women are likely to become mothers during their working years.¹⁶¹

Women can work without insisting on a redefinition of the ideal worker, but most can do so only at the cost of failing to fulfill the ideal. This is not happening. Consequently, what we are seeing today is the adjustment of the gender system to these new conditions in a way that ensures women's continued relegation to the margins of economic life. We are living through a reinvention of the gender system, when we as feminists should be proposing a paradigm shift¹⁶² that entails a redesign of wage labor to take parenting activities into account. There are three basic options for changing the status quo. One is for each individual woman to rebel against the traditional demand that she sacrifice in order for her husband to be an ideal worker. But what will that mean: that *she* will become the ideal worker and he will play the supportive role? This is an alternative most men would find unthinkable because they are socially conditioned to believe that the op-

158. In Washington, D.C., admittedly an inflated market, the average price for a full-time nanny is \$225-\$250 per week, according to estimates by nanny services. See Shannon, WASHINGTONIAN, Oct. 1988, at 171. They place the range from \$150 per week to \$350 per week, in addition to a fee of between \$300 and \$1200 due to the nanny agency as a finder's fee. *Id.* at 171-72.

159. Many employees' sick leave policies do not allow them to take sick leave to care for sick children, and many states' licensing laws do not allow children with communicable diseases to be in day care. Even where licensing requirements do not forbid it, most centers (for obvious reasons) have policies forbidding sick children to attend. Telephone conversation with Barbara Reisman, Child Care Action Campaign (Dec. 16, 1988).

160. Many centers have policies charging parents \$1 per minute for each minute they are late. Although this is understandable from the viewpoint of the child-care workers, it imposes a burden on parents whose employers require them to work overtime. These include not only professional workers, but others. For example, postal workers are required by collective bargaining agreement to work up to two hours overtime with no advance notice. Telephone conversation with Barbara Reisman, Child Care Action Campaign (Dec. 16, 1988). See COALITION OF LABOR UNION WOMEN, BARGAINING FOR CHILD CARE (1985).

161. S. KAMERMAN, A. KAHN & P. KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 5 (1983).

162. Cf. Kerber, *supra* note 2, at 27.

tion to be an ideal worker is their birthright. Most women, moreover, would find this option unattractive because society has nourished in them the belief that it is their birthright to be able to take time off the grind and enjoy their children while they are small.

A second alternative is for both men and women to give a little, so that they share the family responsibilities that preclude ideal worker status. But then neither husband nor wife functions as an ideal worker — a risky strategy in an age of economic uncertainty.¹⁶³

The only remaining alternative is to challenge the structure of wage labor. Since the current structure, and the gender system of which it is a part, increasingly condemns women to poverty, this should be at the core of a feminist program.¹⁶⁴

Such a program would build upon many reforms that currently exist. These include programs such as day care, flex-time, and four-day work weeks,¹⁶⁵ organized labor contracts that provide for unconditional personal days that can be used for care of sick children,¹⁶⁶ as well as paid maternity leave (for the physical disability associated with childbirth) and parental leave.¹⁶⁷ More sweeping proposals are those offered by noted child care specialists Benjamin Spock and Penelope

163. Both these options are doomed politically, as is any political strategy that attempts to gain equality for women by insisting men share women's traditional disabilities. This strategy has been tried before, with notably unsuccessful results. An example is the Victorian attempt to eliminate the sexual double standard by insisting that men join them in adhering to the sexual purity expected of women. Modern reformers have been careful to disassociate advancements for women from sacrifices for men. For example, the Equal Pay Act requires that salary disparities be remedied by raising women's salaries, not lowering men's. See Equal Pay Act, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206(d) (1982)), discussed in *Corning Glass Works v. Brennan*, 417 U.S. 188, 190-91, 195-204 (1974).

In addition, it is likely that men face even greater career difficulties than women when they demand accommodation of child-care responsibilities. See Project, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 STAN. L. REV. 1263, 1300 (1982).

164. For an examination of various policy approaches, see Frug, *supra* note 101, at 61-103; Taub, *supra* note 157, *passim*. (Taub contends that various sorts of work leaves should be available for caretaking responsibilities other than parental ones. *Id.* at 383-84.) To the extent to which employers are changing job expectations to accommodate child-care responsibilities, these changes are commonly thought of as special accommodations to women. See, e.g., Collins, *Working Workers in the 90's: New Role for Family Benefits*, N.Y. Times, July 20, 1988, at A1. This will not change until feminists challenge the assumption that men, but not mothers, are entitled to perform as ideal workers simply because of their sex. Moreover, some evidence exists that such "accommodations to women" are occurring primarily in underpaid "women's jobs." See Brown & Peckman, *Introduction*, in *GENDER IN THE WORKPLACE*, *supra* note 120, at 8.

165. See Collins, *supra* note 164, at A1, A14. This article, based on research from a non-profit group, notes that companies will have to offer "family benefits" in coming years in order to attract workers, since two-thirds of all new entrants into the work force will be women. The same organization reports that 3500 companies offer some form of child-care support.

166. See generally COALITION OF LABOR UNION WOMEN, *supra* note 160.

167. See Collins, *supra* note 164, at A14. Parental leave bills introduced in the 100th Congress were not enacted into law. H.R. 925, 100th Cong., 2d Sess. (1988) (Family and Medical Leave Act); S. 2488, 100th Cong., 2d Sess. (1988) (Parental and Medical Leave Act).

Leach,¹⁶⁸ and by noted economist Heidi Hartmann, who advocates a six-hour work day for all workers.¹⁶⁹

Feminists' goal must be to redesign wage labor to take account of reproduction. Such a goal today seems utopian — but then the eight-hour work day seemed utopian in the mid-nineteenth century.¹⁷⁰ The notion that the wage-labor system should take account of the human life cycle has always faced the argument that such "private costs" as aging or raising children are of no concern to employers. Even in the United States, this view has been successfully challenged: old age is now acknowledged as a reality, and wage-labor expectations have been modified accordingly. That, too, once seemed a utopian goal.¹⁷¹ But expectations change: hegemony is never complete. Feminists should begin to work both towards cultural change and towards the kind of small, incremental steps that will gradually modify the wage-labor system to acknowledge the reality of society's reproductive needs.

III. REFOCUSING THE DEBATE

This section pursues two themes that will be crucial in refocusing the debate within feminism away from the destructive battle between "sameness" and "difference" towards a deeper understanding of gender as a system of power relations. I first argue that despite the force of Catharine MacKinnon's insight that gender involves disparities of power, her rejection of the traditional feminist ideal of gender-neutrality rests on misconceptions about this traditional goal, whose core aim is to oppose rules that institutionalize a correlation between gender and sex. Thus the traditional goal is not one of gender blindness; the goal instead is to deinstitutionalize gender, a long and arduous process that first requires us to see through the seductive descriptions of men and women offered by domesticity. I conclude the article by arguing that to the extent these descriptions offer an accurate description of

168. "Go after our industries!" advises Doctor Spock. He recommends more flexibility in hours, six-hour work days and subsidized day care. Both Penelope Leach, a psychology Ph.D., and Dr. T. Barry Brazelton believe that current trends have potentially adverse psychological consequences for today's families. Brazelton has stressed the need for improved pay for day care workers; Leach advocates extensive paid maternity leave (6 months) and part-time work by both parents (next 18 months). See *Work and Families*, WASHINGTON PARENT 1, 3, 5 (Nov. 1988) (report of a panel discussion in Boston, Apr. 1988). See also Brazelton, *Stress for Families Today*, INFANT MENTAL HEALTH J., Spring 1988, at 65.

169. See Hartmann, *Achieving Economic Equity for Women*, in WINNING AMERICA: IDEAS AND LEADERSHIP FOR THE 1990s, 99 (M. Raskin & C. Hartman, eds. 1988).

170. "In 1840, the average work week in the United States was 78 hours." Frug, *supra* note 101, at 97 n.248 (citing Northrup, *The Reduction in Hours*, in HOURS OF WORK (C. Dankert, F. Mann & H. Northrup eds. 1965)).

171. See A. EPSTEIN, *THE CHALLENGE OF THE AGED* vii (1976); see also C. MEYER, *SOCIAL SECURITY: A CRITIQUE OF RADICAL REFORM PROSPECTS* 9 (1987).

gender differences, they merely reflect the realities of the oppressive gender system. Beyond that, the description is unconvincing.

A. *From Gender-Neutrality to Deinstitutionalizing Gender*

"Sameness" feminists' focus on the similarities between individual men and individual women led them to advocate "gender-neutral" categories that do not rely on gender stereotypes to differentiate between men and women. Recent feminists have challenged the traditional goal of gender neutrality on the grounds that it mandates a blindness to gender that has left women in a worse position than they were before the mid-twentieth-century challenge to gender roles.

This argument has been made in two different ways. Scholars such as Martha Fineman have argued that liberal feminists' insistence on gender-neutrality in the formulation of "no-fault" divorce laws has led to courts' willful blindness to the ways in which marriage systematically helps men's, and hurts women's, careers.¹⁷² Catharine MacKinnon has generalized this argument. She argues that because women are systematically disadvantaged by their sex, properly designed remedial measures can legitimately be framed by reference to sex.¹⁷³

MacKinnon's "inequality approach" would allow for separate standards for men and women so long as "the policy or practice in question [does not] integrally contribute[] to the maintenance of an underclass or a deprived position because of gender status."¹⁷⁴ The strongest form her argument takes is that adherence to gender roles disadvantages women: Why let liberal feminists' taboo against differential treatment of women eliminate the most effective solution to inequality?

This debate is graced by a core truth and massive confusion. The core truth is that an insistence on gender neutrality by definition precludes protection for women victimized by gender.

The confusion stems from the use of the term gender neutrality. One *could* argue that problems created by the gendered structure of wage labor, or other aspects of the gender system, should not be remedied through the use of categories that identify the protected group by reference to the gender roles that have disadvantaged them. For example, one could argue that workers whose careers were disadvan-

172. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 791; Levin, *supra* note 119, at 55. See also Finley, *supra* note 4, at 1148-63.

173. SEXUAL HARASSMENT, *supra* note 99, at 100-41 (discussing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)); FEMINISM UNMODIFIED, *supra* note 99, at 35-36.

174. SEXUAL HARASSMENT, *supra* note 99, at 117. See Taub, Book Review, 80 COLUM. L. REV. 1686 (1980).

tagged by choices in favor of child care should not be given the additional support they need to "catch up" with their former spouses, on the grounds that the group protected inevitably would be mostly female, and this could reinforce the stereotype that women need special protections. Yet I know of no feminist of any stripe who makes this argument, which would be the position of someone committed to gender neutrality.

Traditionally, feminists have insisted not upon a blindness to gender, but on opposition to the traditional correlation between sex and gender. MacKinnon's crucial divergence is that she accepts the use of sex as a proxy for gender. Thus MacKinnon sees nothing inherently objectionable about protecting workers who have given up ideal worker status due to child-care responsibilities by offering protections to *women*.¹⁷⁵ Her inequality approach allows disadvantages produced by *gender* to be remedied by reference to *sex*. This is in effect an acceptance and a reinforcement of the societal presumption that the social role of primary caretaker is necessarily correlated with possession of a vagina.

MacKinnon's approach without a doubt would serve to reinforce and to legitimize gender stereotypes that are an integral part of the increasingly oppressive gender system. Let's focus on a specific example. Scholars have found that the abolition of the maternal presumption in child-custody decisions has had two deleterious impacts on women.¹⁷⁶ First, in the 90 percent of the cases where mothers received custody,¹⁷⁷ mothers often find themselves bargaining away financial claims in exchange for custody of the children. Even if the father does not want custody, his lawyer often will advise him to claim it in order to have a bargaining chip with which to bargain down his wife's financial claims. Second, the abolition of the maternal preference has created situations where a father who wants custody often wins even if he was not the primary caretaker prior to the divorce — on the grounds that he can offer the children a better life because he is richer than his former wife. In these circumstances, the ironic result of a mother's sacrifice of ideal worker status for the sake of her children is that she ultimately loses the children.

While these results are no doubt infuriating, do they merit a return

175. SEXUAL HARASSMENT, *supra* note 99, at 122-24.

176. See Polikoff, *Why Mothers Are Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982); L. WEITZMAN, *supra* note 110, at 217, 310-18.

177. See Polikoff, *supra* note 176, at 236. Fathers now win an estimated one-half to two-thirds of all custody battles. See Salholtz, *supra* note 8, at 59.

to a maternal presumption, as MacKinnon's approach seems to imply? No: the deconstruction of gender, by highlighting the chronic and increasing oppressiveness of the gender system, demonstrates the undesirability of the inequality approach, which would reinforce the gender system in both a symbolic way and a practical one. On a symbolic level, the inequality approach would reinforce and legitimize the traditional assumption that childrearing is "naturally" the province of women. MacKinnon's rule also would reinforce gender mandates in a very concrete way. Say a father chose to give up ideal worker status in order to undertake primary child care responsibility. MacKinnon's rule fails to help him, because the rule is framed in terms of biology, not gender. The result: a strong message to fathers that they should not deviate from established gender roles. MacKinnon's rule operates to reinforce the gender system.

What we need, then, is a rule that avoids the traditional correlation between gender and sex, a rule that is *sex-* but not *gender-*neutral. The traditional goal, properly understood, is really one of *sex*-neutrality, or, more descriptively, one of deinstitutionalizing gender.¹⁷⁸ It entails a systematic refusal to institutionalize gender in any form. This approach mandates not an enforced blindness to gender, but rather a refusal to reinforce the traditional assumption that adherence to gender roles flows "naturally" from biological sex. Reinforcing that assumption reinforces the grip of the gender system as a whole.

For an example that highlights the distinction between gender neutrality and deinstitutionalization, let us return to our "divorce revolution" example. It is grossly unfair for courts suddenly to pretend that gender roles within marriage do not exist once a couple enters the courtroom, and the deinstitutionalization of gender does not require it. What is needed is not a gender-neutral rule but one that avoids the traditional shorthand of addressing gender by reference to sex.

This analysis shows that the traditional commitment, which is really one to deinstitutionalizing gender rather than to gender neutrality, need not preclude rules that protect people victimized by gender. People disadvantaged by gender can be protected by properly naming the group: in this case, not mothers, but anyone who has eschewed ideal

178. Experts agree. See Polikoff, *supra* note 176, at 237. See also Kay, *supra* note 151, at 24, 79.

The term "deinstitutionalizing gender" is Alison Jaggar's. Jaggar, *On Sexual Equality*, 84 *ETHICS* 275, 276 (1975). Jaggar's position appears to have changed. See A. JAGGAR, *supra* note 21, at 148.

worker status to fulfill child-care responsibilities.¹⁷⁹ One court, motivated to clear thinking by a legislature opposed to rules that addressed gender disabilities by reference to sex, has actually framed child-custody rules in this way.¹⁸⁰

The traditional goal is misstated by the term "gender neutrality." The core feminist goal is not one of pretending gender does not exist. Instead, it is to deinstitutionalize the gendered structure of our society. There is no reason why people disadvantaged by gender need to be suddenly disowned. The deconstruction of gender allows us to protect them by reference to their social roles instead of their genitals.

B. *Deconstructing Difference*

How can this be done? Certainly the hardest task in the process of deconstructing gender is to begin the long and arduous process of seeing through the descriptions of men and women offered by domesticity. Feminists need to explain exactly how the traditional descriptions of men and women are false. This is a job for social scientists, for a new Carol Gilligan in reverse, who can focus the massive literature on sex stereotyping in a way that dramatizes that Gilligan is talking about metaphors, not actual people.¹⁸¹ Nonetheless, I offer some thoughts

179. Of course, most of those protected will be women, and that in itself will reinforce the notion that women "are really different but we're not allowed to say so."

Though this is a drawback of sex-neutral standards, it does not obviate the need for them. Such standards are useful because they address pressing social issues without bowing to a central tenet of gender ideology, namely that gender roles are necessarily correlated with biology, and without penalizing men who choose to play gender roles ordinarily assigned to females.

Nonetheless sex-neutral standards designed to address gender-produced disabilities have very real limitations: they no doubt will tend to reinforce the connection between biology and gender in people's minds. This limitation simply highlights the need to link short-term solutions, such as sex-neutral protections for those disadvantaged by gender, with a long-term strategy challenging basic tenets of the gender system as a whole.

180. See *Garska v. McCoy*, 278 S.E.2d 357, 360-63 (W. Va. 1981), cited in Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 190 n.80 (1982).

181. For a recent survey of studies on sex differences, see I. FRIEZE, J. PARSONS, P. JOHNSON, D. RUBLE, & G. ZELLMAN, *WOMEN AND SEX ROLES: A SOCIAL PSYCHOLOGICAL PERSPECTIVE* 45-68 (1978). For a readily accessible survey of the literature, see Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 349-61 (1980).

Although this is not the place to do it, it is also time to bring up out of the footnotes law reviews' treatment of the numerous and cogent critiques of Gilligan's methodology and conclusions. See, e.g., Auerbach, Blum, Smith & Williams, *supra* note 32; Broughton, *Women's Rationality And Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597 (1983); Flanagan & Adler, *Impartiality and Particularity*, 50 SOC. RES. 576 (1983); Kerber, Greeno, Maccoby, Luria, Stack & Gilligan, *On In a Different Voice: An Interdisciplinary Forum*, 11 SIGNS: J. WOMEN CULTURE & SOC. 304 (1986); Nails, *Social-Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RES. 643 (1983). The interesting thing from a cultural standpoint is how little impact these critiques have made on the widespread acceptance of Gilligan's theories.

on Gilligan's central imagery: that women are focused on relationships while men are not. As I see it, to the extent this is true, it is merely a restatement of male and female gender roles under the current gender system. Beyond that, it is unconvincing.

This is perhaps easiest to see from Gilligan's description of men as empty vessels of capitalist virtues — competitive and individualistic and espousing liberal ideology to justify this approach to life. Gilligan's description has an element of truth as a description of *gender*: it captures men's sense of entitlement to ideal worker status and their gendered choice in favor of their careers when presented with the choice society sets up between child-care responsibilities and being a "responsible" worker.

Similarly, Gilligan's central claim that women are more focused on relationships reflects gender verities. It is true in the sense that women's lives are shaped by the needs of their children and their husbands — but this is just a restatement of the gender system that has traditionally defined women's social existence in terms of their husbands' need to eliminate child-care and other responsibilities that detract from their ability to function as ideal workers. And when we speak of women's focus on relationships with *men*, we also reflect the underlying reality that the only alternative to marriage for most women — certainly for most mothers — has traditionally been poverty, a state of affairs that continues in force to this day.¹⁸²

The kernel of truth in Gilligan's "voices," then, is that Gilligan provides a description of gender differences related to men's and women's different roles with respect to wage labor and child care under the current gender regime. Yet we see these true gender differences through glasses framed by an ideology that distorts our vision. To break free of traditional gender ideology, we need at the simplest level to see how men nurture people and relationships and how women are competitive and powerful. This is a task in which we as feminists will meet considerable resistance, both from inside and outside the feminist movement.

Our difficulty in seeing men's nurturing side stems in part from the word "nurture." Although its broadest definition is "the act of promoting development or growth,"¹⁸³ the word derives from nursing a baby, and still has overtones of "something only a mother can do." Yet men are involved in all kinds of relationships in which they promote another's development in a caring way: as fathers, as mentors, as

182. See C. MACKINNON, *supra* note 41, at 39. MacKinnon has begun the task of diffusing the "naturalness" of gender stereotypes about women.

183. THE AMERICAN HERITAGE DICTIONARY (William Morris ed. 1970).

camp counselors, as boy scout leaders. These relationships may have a somewhat different emotional style and tone than do those of women and often occur in somewhat different contexts: that is the gender difference.¹⁸⁴ But a blanket assertion that women are nurturing while men are not reflects more ideology than reality.

So does the related claim that women's voice involves a focus on relationships that is lacking in men. Men focus on relationships, too. How they can be said not to in a culture that deifies romantic love as much as ours does has always mystified me. Perhaps part of what resonates in the claim that men do not focus on relationships is that men *as a group* tend to have a different style than do women: whereas women tend to associate intimacy with self-disclosure, men tend not to.¹⁸⁵ This may be why women forget about the role that relationships play in men's lives, from work relationships, to solidarity based on spectator sports, to time spent "out with the boys."¹⁸⁶ These relationships may not look intimate to women, but they are often important to men.

Ideology not only veils men's needy side, it also veils the competitive nature of many women who want power as avidly as men. "Feminists have long been fiercely critical of male power games, yet we have often ignored or concealed our own conflicts over money, control, position, and recognition. . . . It is time to end the silence."¹⁸⁷ The first step, as these authors note, is to acknowledge the existence of competition in women's lives. Women's desire for control may be exercised in running "a tight ship" on a small income, in tying children to apron strings, or in nagging husbands — the classic powerplay of the powerless.¹⁸⁸ Note how these examples tend to deprecate women's desire for power. These are the stereotypes that come to mind because they confirm the ideology that "real" women don't need power. These are ways women's yearning for power has been used as evidence against them, as evidence they are not worthy as wives, as mothers, or as

184. See E. WOLGAST, *supra* note 4, at 129 ("The kind of nurturing given may be sex-differentiated, then, while nurturing is not."). Nonetheless, feminists of difference often tend to assume that nurturing belongs to women in the sense that it is part of "women's voice." See, e.g., Auerbach, Blum, Smith & Williams, *supra* note 32, at 158.

185. See Rubin & Shenker, *Friendship, Proximity, and Self-disclosure*, 46 J. PERSONALITY 1-22 (1978).

186. The irony is that, as recently as twenty years ago, male bonding was celebrated. Perhaps the celebration of women's culture can be viewed as a response by women who as youngsters were informed (as I was) that women were too petty and competitive to enjoy the kind of deep and lasting friendships males experienced. See E. L. RANELAGH, *MEN ON WOMEN* (1985).

187. COMPETITION: A FEMINIST TABOO? 1 (V. Miner & H. Longino eds. 1987).

188. Literature provides a rich source of examples of men as nurturers and women as power-hungry, for those of us who are not sociologists. See, e.g., P. ROSE, *PARALLEL LIVES: FIVE VICTORIAN MARRIAGES* 8-9 (1983).

women. Feminists' taboo against competition has only reinforced the traditional view that real women don't need power.¹⁸⁹ Yet women's traditional roles have always required them to be able to wield power with self-confidence and subtlety. Other cultures recognize that dealing with a two-year-old is one of the great recurring power struggles in the cycle of human life. But not ours. We are too wrapped up in viewing childrearing as nurturing, as something opposed by its nature to authoritative wielding of power, to see that nurturing involves a sophisticated use of power in a hierarchical relationship. The differences between being a boss and a mother in this regard are differences in degree as well as in kind.

Moving ever closer to the bone, we need to reassess the role of power in relationships based on romantic love. The notion that a marriage involves complex ongoing negotiations over power may seem shocking. But if we truly are committed to a deconstruction of traditional gender verities, we need to stop blinding ourselves to nurturing outside the home and to power negotiations within it.¹⁹⁰

CONCLUSION

The first message of this article is that feminists uncomfortable with relational feminism cannot be satisfied with their conventional response: "When we get a voice, we don't all say the same thing."¹⁹¹ The traditional focus on how individuals diverge from gender stereotypes fails to come to terms with gender similarities of women as a group. I have tried to present an alternative response. By taking gender seriously, I have reached conclusions very different from those of the relational feminists. I have not argued that gender differences do not exist; only that relational feminists have misdescribed them.

Relational feminism, I have argued, can best be understood as encompassing two critiques: the critique of possessive individualism and the critique of absolutes. Both are better stated in nongendered terms, though for different reasons. Feminists are simply incorrect when

189. *Id.*

190. For an insightful analysis, see *id.* at 8-9. We need also to become more self-conscious about how ideological influences make our interpretations highly selective. Note that we hear incessantly that ten-year-old girls establish best friend relationships whereas boys band together for games. See, e.g., C. GILLIGAN, *supra* note 12, at 9-11; Maccoby, *Social Groupings in Childhood: Their Relationship to Prosocial and Antisocial Behavior in Boys and Girls*, in DEVELOPMENT OF ANTISOCIAL AND PROSOCIAL BEHAVIOR: RESEARCH, THEORIES, AND ISSUES (D. Olwens, J. Block & M. Radke-Yarrow eds. 1986); Shreve, *supra* note 17, at 15. Maccoby's study is cited to prove that women focus on relationships whereas men focus on competition, an interpretation that ignores the important bonding that occurs in team sports as well as the intensely competitive jockeying that accompanies the school-age battle for desirable "best friends."

191. Comments of Ellen Du Bois, in *A Conversation*, *supra* note 9, at 73.

they claim the critique of absolutes as women's voice, since that critique has been developed by men, and its ideal is different from the traditional stereotype of women as emotional and illogical.

Relational feminism's linkage of women to the critique of possessive individualism is trickier. If all relational feminists claim is that elite white men are disproportionately likely to buy more completely into the ideology that controls access to wealth, in one sense this is true. I would take it on faith that a higher proportion of elite white males buy into possessive individualism than do black males, working class and poor males, or women of all groups. Indeed, in the last twenty years writers have documented that these marginalized groups have developed their own cultures that incorporate critiques of mainstream culture.¹⁹² "One very important difference between white people and black people is that white people think you are your work," a black informant told an anthropologist in the 1970s. "Now a black person has more sense than that . . ."¹⁹³ Marginalized groups necessarily have maintained a more critical perspective on possessive individualism in general, and the value of wage labor in particular, than did white males who had most to gain by taking the culture's dominant ideology seriously.¹⁹⁴ Moreover, the attitude of white women towards wage labor reflects their unique relationship with it. Traditionally, married white women, even many working-class women, had a relationship to wage labor that only a very few leisured men have ever had: these women viewed wage labor as something that had to prove its worth in their lives, because the option not to work remained open to them psychologically (if, at times, not economically).

Fewer blacks and women have made the virtues of possessive individualism a central part of their self-definition, and this is a powerful force for social change. But blacks as a group and women as a group have these insights not because they are an abiding part of "the" black family or of women's "voice." These are insights black culture and women's culture bring from their history of exclusion. We want to preserve the insights but abandon the marginalization that produced them: to become part of a mainstream that learns from our experi-

192. See, e.g., Janeway, *Women and the Uses of Power*, in *THE FUTURE OF DIFFERENCE* (H. Eisenstein & A. Jardine eds. 1985).

193. J.L. GWALTNEY, *DRYLONGSOUL: A SELF-PORTRAIT OF BLACK AMERICA* 173-74 (1981), quoted in S. Harley, "When Your Work Is Not Who You Are": The Development of a Working-Class Consciousness Among Afro-American Women, Paper given at the Conference On Women in the Progressive Era, sponsored by the American Historical Association in conjunction with the National Museum of American History (Mar. 10-12, 1988).

194. See generally *THE NEW HISTORY: THE 1980S AND BEYOND* (T. Rabb & R. Rotberg eds. 1982).

ence. The *Sears* case shows how these insights' transformative potential can easily backfire if the critiques can be marginalized as constitutive of a semi-permanent part of the black or female personality.

Relational feminists help diffuse the transformative potential of the critique of possessive individualism by championing a gendered version of that critique. The simple answer is that they should not say they are talking about women if they admit they aren't. Once they admit they are talking about *gender*, they have to come to terms with domesticity's hegemonic role in enlisting women in their own oppression.

The approach of deconstructing gender requires women to give up their claims to special virtue. But it offers ample compensation. It highlights the fact that women will be vulnerable until we redesign the social ecology, starting with a challenge to the current structure of wage labor. The current structure may not have been irrational in the eighteenth century, but it is irrational today. Challenging it today should be at the core of a feminist program.

The message that women's position will remain fundamentally unchanged until labor is restructured is both a hopeful and a depressing one. It is depressing because it shows that women will remain economically vulnerable in the absence of fundamental societal change.¹⁹⁵ Yet it is hopeful because, if we heed it, we may be able to unite as feminists to seize the opportunity offered by mothers' entry into the work force, instead of frittering it away rediscovering traditional (and inaccurate) descriptions of gender differences.

195. Feminists have long realized that "[a]chieving sex-based equality requires social movement for transformation of the family, child-rearing arrangements, the economy, the wage labor market, and human consciousness." Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 956 (1984).